

**To:** Blake, Wendy[Blake.Wendy@epa.gov]; Neugeboren, Steven[Neugeboren.Steven@epa.gov]; Kupchan, Simma[Kupchan.Simma@epa.gov]; Nguyen, Quoc[Nguyen.Quoc@epa.gov]; Miller, Kevin[Miller.Kevin@epa.gov]  
**Cc:** Nagle, Deborah[Nagle.Deborah@epa.gov]; Abrams, Nancy[Abrams.Nancy@epa.gov]  
**From:** Levine, MaryEllen  
**Sent:** Fri 3/31/2017 1:23:23 AM  
**Subject:** Fwd: OWM News Update: 3/30/17

## Ex. 5 - Deliberative Process

Mary Ellen Levine  
Assistant General Counsel  
Water Law Office  
(202) 564-5487

Begin forwarded message:

**From:** "Schollhamer, Mary" <Schollhamer.Mary@epa.gov>  
**Date:** March 30, 2017 at 6:19:05 PM EDT  
**To:** OW-OWM-Everyone <OWOWMEveryone@epa.gov>, "Levine, MaryEllen" <levine.maryellen@epa.gov>, "Duke, Nia" <Duke.Nia@epa.gov>, "Thomas, Latosha" <Thomas.Latosha@epa.gov>, "Fuld, John" <Fuld.John@epa.gov>, "Altieri, Sonia" <Altieri.Sonia@epa.gov>  
**Subject:** OWM News Update: 3/30/17

### Contents:

- Willoughby receives low-interest EPA loan to solve sewage overflow
- California's Water Utilities Prepare For New Water Loss Law
- Ecuador Touts Flood Prevention Measures Amid Record Rains
- Power Plants Seek New EPA Discharge Limits for Metals, Toxics
- EPA Now Limited On Farm Data It Can Release

## Willoughby receives low-interest EPA loan to solve sewage overflow

*Source: The News-Herald*

*By: Kristi Garabrandt*

Construction crews are digging a hole at the Quentin Road pumping station that will be filled with a 1 million-gallon underground storage basin for sewage.

It is a joint project between Willoughby and Eastlake who have an agreement for the operation, maintenance and improvements to the Willoughby-Eastlake Joint Wastewater Treatment System.

“Willoughby kind of has contractual control, but it’s technically owned 50/50 with Eastlake,” said Jim Sayles vice-president of CT Consultants, the architects and engineers for the project. “So, Willoughby usually runs the projects and Eastlake shares in the cost and the decision making.”

According to Sayles, the project arose out of an overall sewer study done several years ago for the two cities with the purpose of determining a way to reduce or mitigate the bypassing of sewage directly to Lake Erie. The pumping station was one of the locations the Environmental Protection Agency had on their list due to the fact that during heavy storms raw sewage would bypass directly into Lake Erie.

The project which is to be constructed in Willoughby, according to [www.willoughbyohio.com](http://www.willoughbyohio.com), will involve the “construction of an underground wastewater flow equalization basin capable of storing 1,000,000 gallons with cast in place concrete walls and floor and buried concrete roof. The project will include a transfer pump station, site piping, paving, erosion/sediment control, grading and landscaping, security fence, standby power generator, sediment flushing system, ventilation system and utility connections and relocations as required.”



Additionally, according to the city, there will be level monitoring for normal and alarm conditions.

The overflow problem will be solved by allowing heavy rain water to divert to the underground storage tanks. Once rain stops and flows to the sewers are reduced then the pumps will send the sewage from the tanks back into the systems so it can go to the wastewater plant and be treated, Sayles said.

The estimated cost of this projected is \$5,183,443.46, with approximately \$4.5 million being funded by the Water Pollution Control Loan Fund, which is a low-interest EPA loan.

“Created in 1989, WPCLF provides below market interest rate loans for communities to improve their wastewater treatment systems,” according to a media release from Ohio EPA. “The reduced loan rate will save Willoughby about \$653,000,000.”

State Sen. John Rogers applauded the state loan awarded earlier this week.

“The Ohio EPA loan to Willoughby is an example of how the state and local communities can work together to improve infrastructure while also protecting our environment,” Rogers said in a press release. “I am pleased to see the state work with the city to help complete this important project while preserving a tremendous resource.”

Rogers also mentions that not only will the loan help maintain the infrastructure while protecting the environment but will also grant Willoughby some flexibility in it’s budget to work on other projects.

The EPA loans are revolving loans that are partially supported by federal grants and are intended to last indefinitely according to the Ohio EPA media release. “The loan program is managed by Ohio’s EPA Division of Environmental and Financial Assistance with help from the Ohio Water Development Authority.”

## California's Water Utilities Prepare For New Water Loss Law

*Source: Water Online*

*By: Sara Jerome*

California water utilities will need to report water loss figures to the state under a new law that aims to reduce non-revenue water and conserve resources.

“Soon Californians will know exactly how much their water utilities are leaking. Senate Bill 555, a law passed by the state legislature in 2015, requires large urban water utilities — those treating more than 3,000 acre-feet (3.7 million cubic meters) of water annually or with more than 3,000 connections — to file water loss audits starting in October. There are 410 utilities subject to the law,” News Deeply reported.

Todd Thompson, a senior engineer at the California Department of Water Resources, spoke to News Deeply about how the law will be implemented. He noted that about 60 percent of the water utilities affected by this law already prepare water loss reports on a voluntary basis.

“[The law is] part of improving best management practices on the water supply side. And it is a first step in improving system operation and efficiency,” he said, per the report.

On its blog, Master Meter published a state-by-state comparison of water-loss policies in different locations. It said California is among the states with the most water loss policies. Along with the new reporting requirement, “by 2020, the State Water Resources Control Board must adopt a performance standard for the volume of losses from urban water distribution systems,” the blog said.

The blog also singled out Georgia as mandating the highest level of water-loss policies

among the states. Thompson explained how California has learned from Georgia.

“That was also a result of a drought they went through. They are at least six years ahead of us. I think their law started in 2010. They’ve had good acceptance with it and actually we are using some of the info they’ve learned in our program. We have gained from their experience,” he said, per News Deeply.

The following states have no water loss reporting requirements, according to the Master Meter blog: Alabama, Alaska, Arkansas, Connecticut, Florida, Hawaii, Idaho, Iowa, Kansas, Louisiana, Maine, Montana, Nebraska, Nevada, New Mexico, Mississippi, Missouri, North Dakota, Oklahoma, South Dakota, Utah, Vermont, and Wyoming.

Non-revenue water plagues every water system. According to a [report](#) by the World Bank, "The total cost to water utilities caused by non-revenue water worldwide can be conservatively estimated at \$141 billion per year, with a third of it occurring in the developing world. In developing countries, about 45 million cubic meters are lost daily through water leakage in the distribution networks — enough to serve nearly 200 million people."

### **Ecuador Touts Flood Prevention Measures Amid Record Rains**

*Source: Circle of Blue*

*By: Codi Kozacek*

#### **The Rundown**

A localized El Niño continues to batter countries along South America’s Pacific Coast, but communities in Ecuador have been relatively unscathed compared to those in neighboring Peru. When asked why, government officials, including President Rafael Correa, point to a series of dams, reservoirs, dikes, and break walls installed in the Cañar, Guayas, and Naranjal river basins that divert water away from towns and farmland. Still, emergencies caused by floods and landslides spiked in Quito following record rainfall, and the government declared disaster areas in four provinces this month.

“Look how much it’s impacting Peru, the same storm that we are suffering ourselves. This isn’t about luck, it’s about planning, hard work, and good investment, which provides the best savings. This is saving us hundreds of millions of dollars.” — Rafael Correa, president of Ecuador, praising his country’s flood defense systems during a visit this month to El Triunfo in Guayas province. Ecuador built the infrastructure in response to a strong, global El Niño in 1997 and 1998 that inundated vast areas of Guayas and Cañar provinces. A coastal El Niño this year has rained destruction on Peru, but there is comparatively little damage in Ecuador.

### By The Numbers

45,000 hectares flooded in Cañar province and the Naranjal River Basin during a 1997-98 El Niño. The event killed 286 people in Ecuador.

349 kilometers of protective dikes are part of six major flood control projects designed in response to the 1997-98 El Niño. The projects include a 23-kilometer bypass canal that can divert 1,500 cubic meters of water per second into the Gulf of Guayaquil. Together with the dikes and a series of pumping stations and reservoirs, the canal protects 655,000 people and 285,000 hectares in the Cañar, Guayas, and Narangal river basins, according to Ecuador’s Public Water Company.

18 people killed by floods and related disasters during Ecuador’s rainy season this year. The rains also injured more than 1,200 people, affected more than 8,500 families, and destroyed 144 homes and seven bridges.

4 provinces declared disaster areas by the Ecuador government this month. They are Esmeraldas, Guayas, Manabi, and Santa Elena. An “orange alert” was issued for the provinces of El Oro, Loja, and Los Rios, activating local emergency operation committees to prepare for potential disasters.

493 emergency incidents reported in Quito this rainy season, including floods, collapsed houses, and fallen trees, according to the city’s Emergency Operations Center.

30 to 40 percent reduction in productivity at several public work projects in Quito due to delays caused by heavy rains. The rains also forced contractors to use drainage and pumping systems to reduce water accumulation in the Quito Metro, which is under construction.

#### Science, Studies, And Reports

More than double the normal amount of rain fell in March across Azuay, Cotopaxi, and Pichincha provinces, and rainfall reached 73 percent above normal in Guayas province, according to data released this week by the Secretary of Risk Management. Several stations in Quito, located in Pichincha province, registered record levels of rainfall this month. By comparison, the 1997-98 El Niño dropped nearly 10 times the average amount of rain on Ecuador and Peru.

Under long-term climate change scenarios, scientists expect rainfall extremes to become more common along the coasts of Ecuador and Peru, raising the risk of floods and landslides. At the same time, shrinking glaciers in the Andes could harm Ecuador's páramos grasslands, which help store and regulate water flows. Glaciers in the tropical Andes shrank an average of 30 to 50 percent over the past four decades.

#### On The Radar

Heavy rains and storms are expected to continue through the end of the month, particularly along Ecuador's central and southern coast. The national committee that tracks El Niño conditions will meet again to update forecasts on March 30.

#### Power Plants Seek New EPA Discharge Limits for Metals, Toxics

*Source: Bloomberg BNA*

*By: Amena Saiyid*

Coal-fired power plants want federal regulators to take a second look at discharge limits for certain heavy metals and other toxics, such as mercury, arsenic and selenium, saying the existing requirements are unachievable and costly.

The Utility Water Act Group petitioned the EPA to reconsider the effluent limits (RIN: 2040-AF14) that it revised in 2015 to regulate the discharge of coal ash wastewater and limit releases of arsenic, mercury, selenium and nitrates captured by scrubbers and other controls installed at coal-fired power plants to reduce harmful air emissions.

The March 24 petition also exhorted the EPA to suspend the compliance deadlines that range between 2018 and 2023 and stay the rule while a federal appeals court in New Orleans weighs multiple challenges from the electric power industry (SW. Elec. Power Co. v. EPA, 5th Cir., No. 15-60821, 11/20/15).

UWAG, the Southwestern Electric Power Co, a subsidiary of American Electric Power, and Union Electric Co., an Ameren Corp. subsidiary, say the 2015 rule if implemented as written will “cause negative impacts on jobs due to the excessive costs of compliance—which were grossly underestimated by EPA—and regulatory burdens forcing plant closures.”

UWAG, an ad hoc group housed at the law firm Hunton & William, advocates on behalf of 163 individual power companies including AEP, and three national trade associations of energy companies—the Edison Electric Institute, the National Rural Electric Cooperative Association, and the American Public Power Association.

But environmental groups that pushed for this rule see this petition as a way for the coal and electric power industries to “dump largely untreated wastewater into lakes and streams,” Thomas Cmar, an Earthjustice attorney, told Bloomberg BNA March 29.

#### ‘Overly Ambitious Assumptions’

The Obama EPA not only assumed the availability of technologies to meet the limits imposed in the rule, but also made “overly ambitious assumptions” about costs associated with the ability of power plants to comply, Kristy A.N. Bulleit, Harry Johnson and

Elizabeth Aldridge, of Hunton & Williams, said in the UWAG petition.

The group also alleged that the EPA underestimated the cumulative cost of complying with multiple rules affecting the power industry, including greenhouse gas regulations and coal ash disposal.

The petition also said EPA won't share how it used confidential business information gleaned from the industry to reach conclusions about the ability of certain technologies to remove selenium from power plants that burn low-sulfur sub-bituminous coals or high-sulfur lignite coals.

The EPA estimated annual average industry wide costs of about \$480 million for complying with the rule, but Burns & McDonnell, an engineering firm, in 2015 estimated a compliance cost range for each plant of \$30 million to \$300 million. These include costs to convert wet bottom ash for dry handling, followed by physical and chemical precipitation methods, and biological treatment for wastewater.

#### Invoking Executive Orders

The industry group said the rule is inconsistent with President Trump's recent orders on regulatory reform, particularly E.O. No. 13777, which required each agency to set up a task force charged with evaluating existing regulations that are unduly burdensome and making recommendations to repeal and replace them.

AEP, a UWAG member that supports the petition, wants the EPA to evaluate its compliance schedule if it reconsiders the rule, but more importantly to provide flexibility to the industry based on new information that has been collected since the 2015 rulemaking.

“There have been performance issues with the EPA's prescribed technologies preventing the anticipated pollutant removals for all coal types,” John McManus, AEP vice president for environmental services, told Bloomberg BNA.

## Better Balance

McManus is hoping the EPA's decision results in a “better balance between environmental protection and the ultimate cost to our customers.”

The environmental groups dismissed the industry's cost concerns, saying the effluent limits in question included limits for the first time on heavy metals and other toxic pollutants that weren't regulated under the 1982 standards, according to Cmar who also is defending the EPA rule in the Fifth Circuit.

Cmar warned that the environmental groups would return to the court if the EPA tries to stay the rule, which it revised in response to a court-ordered mandate.

Ironically, the Environmental Integrity Project, Earthjustice and the Sierra Club also have sued the EPA in the U.S. Court of Appeals for the District of Columbia Circuit over the agency's refusal to release the confidential business information that it collected from the power sector and used as the technical basis for the effluent limits and estimated compliance costs.

## EPA Now Limited On Farm Data It Can Release

*Source: Farm and Ranch Guide*

*By: Staff*

A federal judge yesterday approved a settlement agreement between the National Pork Producers Council and the American Farm Bureau Federation and the U.S. Environmental Protection Agency, limiting EPA's release of information on livestock farmers.

Under the agreement, the agency only may provide under a Freedom of Information Act (FOIA) request the city, county, zip code and Clean Water Act permit status of a concentrated animal feeding operation. The agreement also requires EPA to conduct



training on FOIA, personal information and the federal Privacy Act.

The settlement stems from the February 2013 release by EPA's Office of Water to several activist groups, which filed a FOIA request, of extensive private and personal information the agency collected on farmers in 29 states. (EPA gathered the information despite being forced in 2012 to drop a proposed data reporting rule for large farms because of concerns about the privacy and biosecurity of family farms.)

"We're pleased with this agreement, which will protect the personal and private information, including cell phone numbers and health information, of America's farmers and ranchers," said NPPC President Ken Maschhoff, a pork producer from Carlyle, Ill. "EPA's 2013 release to activist groups of sensitive materials on more than 100,000 farmers and ranchers was an outrageous abuse of its power and trust. This settlement helps ensure that won't happen again."

Following the 2013 release and after objections from NPPC, the Farm Bureau and other agricultural groups, EPA requested that the activist organizations return the data, but the agency subsequently was prepared to release additional farm information it collected from seven other states. NPPC and the Farm Bureau also objected to the additional release, and in July 2014 filed suit against EPA in the U.S. District Court for the District of Minnesota.

That court in late 2015 dismissed the lawsuit, but the U.S. Court of Appeals for the 8th Circuit in St. Louis reinstated it, and last September it ruled that EPA "abused its discretion in deciding that the information at issue was not exempt from mandatory disclosure under Exemption 6 [personal privacy interests] of FOIA."

"NPPC will continue vigorously defend the rights and privacy of its producers against outrageous and unethical government actions," Maschhoff said.

Mary G Schollhamer

Communications Coordinator

Office of Wastewater Management

U.S. Environmental Protection Agency

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*Office of Wastewater Management: Solutions for Clean Water*

**To:** Gottesman, Larry[Gottesman.Larry@epa.gov]  
**Cc:** Miller, Kevin[Miller.Kevin@epa.gov]; Blake, Wendy[Blake.Wendy@epa.gov]; Kupchan, Simma[Kupchan.Simma@epa.gov]; Levine, MaryEllen[levine.maryellen@epa.gov]; Nagle, Deborah[Nagle.Deborah@epa.gov]; Molloy, Jennifer[molloy.jennifer@epa.gov]  
**From:** Nguyen, Quoc  
**Sent:** Thur 3/30/2017 4:32:00 PM  
**Subject:** FOIA Instructions for AFBF v. EPA (CAFO Litigation Settlement Agreement) - PLEASE TRANSMIT TODAY  
[FINAL Instructions for Handling CAFO Information Related to AFBF 3-30-17.pdf](#)

Hi Larry,

I have attached instructions for responding to future FOIA requests that seek concentrated animal feeding operation information (CAFO) at issue in the AFBF v. EPA FOIA litigation. As indicated in the instructions, we must disseminate these instructions to all FOIA HQ Coordinators and FOIA Regional Officers pursuant to the settlement agreement.

I will attend both the FOIA Coordinator and Officer conference calls in April to explain the instructions and address any residual questions.

- Sidebar: EPA also needs to conduct a privacy training for all OW managers and FOIA Coordinators/Officers in calendar year 2017.

**Please transmit these instructions to the FOIA Coordinators and Officers TODAY.** (We are required to send these instructions out one week after the settlement agreement signature, which is today.) Thank you so much for your help in this matter. Please call me if you have any questions.

Sincerely,

Quoc

Quoc P. Nguyen

Office of General Counsel

U.S. Environmental Protection Agency

1200 Pennsylvania Avenue, NW

Washington, DC 20460

202-564-6343

PRIVILEGED COMMUNICATION for internal deliberation only; may contain deliberative, attorney-client, attorney work product, or otherwise privileged material; do not distribute outside EPA or DOJ.

**Instructions for Handling Concentrated Animal Feeding Operations Information Related to AFBF v. EPA, No. 13-1751 (D. Minn.)  
March 30, 2017**

The Agency recently settled a reverse-Freedom of Information Act (FOIA) case involving certain information related to concentrated animal feeding operations and facilities (CAFOs) for 36 states. Specifically, on March 24, 2017, the U.S. District Court in the District of Minnesota entered a Stipulation of Settlement and Dismissal (Settlement Agreement) in AFBF v. EPA, No. 13-1751 (D. Minn.). See Appendix A, Settlement Agreement.

**The Settlement Agreement requires your attention in the event future FOIA requests seek the information at issue in the settled case.**

Pursuant to the Settlement Agreement, EPA agreed to provide written instructions to Headquarters FOIA Coordinators and Regional FOIA Officers. The instructions below address how the Agency should respond to future FOIA requests for the information at issue in the settled case.

**INSTRUCTIONS**

***Information addressed by this instruction:*** The information at issue in the settled case was the set of 73 documents or spreadsheets responsive to two FOIA requests submitted by Earthjustice (EPA-HQ-2012-001337) and the Natural Resources Defense Council and the Pew Charitable Trusts (EPA-HQ-2013-001516). See Appendix B, the two FOIA requests. The Office of Water's Office of Wastewater Management collected this information about CAFOs from twenty-seven state permitting authorities, eight state websites, EPA databases, and EPA regional offices. The Office of Wastewater Management responded to the two FOIA requests (EPA-HQ-2012-001337 and EPA-HQ-2013-001516) and produced redacted information from the 73 documents or spreadsheets through FOIAonline. The following links will direct you to the Agency's final response to these two requests:

- 1) EPA-HQ-2012-001337:  
<https://foiaonline.regulations.gov/foia/action/public/view/request?objectId=090004d28000843a>
- 2) EPA-HQ-2013-001516:  
<https://foiaonline.regulations.gov/foia/action/public/view/request?objectId=090004d28001613d>

Provided below are examples of FOIA requests the Agency has received that specifically sought the 73 documents or spreadsheets at issue in the settled case.

*Language from FOIA requests seeking the 73 documents or spreadsheets:*

- "Freedom of Information Act request for information related to the withdrawal of the CAFO Reporting Rule, from Eve C. Gartner, Esq, Earthjustice, dated September 11, 2012."

- “Freedom of Information Act request for disclosure of records [related to the withdrawal of the CAFO Reporting Rule]...from Claire Althouse [or Jon Devine], Natural Resources Defense Council, dated October 24, 2012.”
- “All records responsive to FOIA requests 2012-1337 and 2013-1516.”
- “[A]ny records...to the proposed NPDES CAFO Reporting Rule (76 Fed. Reg. 65,431 (Oct. 21, 2011)).”

***Instructions for handling CAFO FOIA requests seeking the 73 documents or spreadsheets at issue in the settled case:*** If EPA receives a FOIA request seeking the 73 documents or spreadsheets or to which the 73 documents or spreadsheets, as described above (*see* “Information addressed by this instruction”), are responsive, you are to respond by referring the requester(s) to FOIAonline and referencing the response provided to EPA-HQ-2012-001337 and EPA-HQ-2013-001516. Please refer to the public URL links above.

If you have any questions, please contact Jenny Molloy, Office of Water, at 202-564-1939 or Quoc Nguyen, Office of General Counsel, at 202-564-6342.

**APPENDIX A: Settlement Agreement**

UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA  
Civil No. 13-1751 (ADM/TNL)

AMERICAN FARM BUREAU  
FEDERATION, and NATIONAL PORK  
PRODUCERS COUNCIL

Plaintiffs,

v.

U.S. ENVIRONMENTAL PROTECTION  
AGENCY, and GINA McCARTHY,<sup>1</sup>  
Administrator U.S. Environmental Protection  
Agency,

Defendants,

and

FOOD & WATER WATCH,  
ENVIRONMENTAL INTEGRITY  
PROJECT, AND IOWA CITIZENS FOR  
COMMUNITY IMPROVEMENT,

Intervenors.

**STIPULATION OF SETTLEMENT  
AND DISMISSAL**

WHEREAS, on July 5, 2013, Plaintiffs, the American Farm Bureau Federation (“AFBF”) and National Pork Producers Council (“NPPC”) (together, “Plaintiffs”), filed their Complaint for Declaratory and Injunctive Relief (“Complaint”), alleging a claim under the Administrative Procedure Act and seeking an Order enjoining the U.S.

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<sup>1</sup> Scott Pruitt is now the Administrator of EPA. Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, Mr. Pruitt should be substituted for Gina McCarthy as defendant in this suit.

Environmental Protection Agency (“EPA”) from disclosing certain information (referred to herein as the “disputed information”) in response to Freedom of Information Act (“FOIA”) requests submitted by Earthjustice (EPA-HQ-2012-001337) and the Natural Resources Defense Council and the Pew Charitable Trusts (EPA-HQ-2013-001516).

WHEREAS, the disputed information consists of a set of 73 documents (“disputed information”) that EPA collected from twenty-seven state permitting authorities, eight state websites, EPA databases, and EPA regional offices, following the Agency’s determination to compile reliable information about concentrated animal feeding operations (“CAFOs”) in the United States using existing data sources rather than promulgating a rule requiring CAFOs to submit information directly to EPA.

WHEREAS, in this lawsuit, Plaintiffs allege that portions of the disputed information are protected by Exemption 6 of the FOIA, which pertains to “[p]ersonnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” 5 U.S.C. § 552(b)(6).

WHEREAS, the disputed information consists of data pertaining to animal feeding operations, which is aggregated by state, for the following states: Alabama, Arizona, Arkansas, California, Colorado, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Louisiana, Maine, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Jersey, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Dakota, Tennessee, Texas, Utah, Washington, Wisconsin, and Wyoming.

WHEREAS, the disputed information was filed in the administrative record in this matter, at ECF. No. 69, Exhibits 16 and 32.

WHEREAS, Plaintiffs, AFBF and NPPC, and Defendants, Administrator Scott Pruitt and EPA, wish to avoid any further litigation and controversy and to settle and



compromise fully any and all claims and issues that have been raised, or could have been raised in this action, which have transpired prior to the execution of this Stipulation of Settlement and Dismissal ("Stipulation").

Now, therefore, the parties, by and through their respective counsel, hereby settle and compromise the above-captioned lawsuit. The parties stipulate that this matter is hereby settled and compromised on the following terms:

1. Defendants agree that only the columns reflecting permit status, city, county, and 5-digit zip code in the disputed information, which, as defined above, consists of 73 documents set forth at ECF No. 69, Exhibits 16 and 32, will be released in response to the FOIA requests at issue in this case, EPA-HQ-2012-001337 and EPA-HQ-2013-001516. All other columns and fields in the disputed information will be redacted pursuant to 5 U.S.C. § 552(b)(6).

2. Defendants have provided, and Plaintiffs have reviewed, the disputed information with the agreed-upon redactions, and those redactions are attached hereto as Exhibit A.

3. Defendants also agree to release the same redacted disputed information, as set forth in Exhibit A, in response to the following pending FOIA requests submitted to EPA Headquarters that seek the disputed information: (1) EPA-HQ-2013-006737; (2) EPA-HQ-2013-006604; (3) EPA-HQ-2013-004128; (4) EPA-HQ-2013-008906; (5) EPA-HQ-2013-007430; (6) EPA-HQ-2013-006913; (7) EPA-HQ-2013-004097; (8) EPA-HQ-2015-004064; (9) EPA-HQ-2015-006732; and (10) EPA-HQ-2016-008563. Defendants further agree to post the redacted disputed information, responsive to the

FOIA requests identified in Paragraphs 1 and 3, to FOIAonline ([www.FOIAonline.regulations.gov](http://www.FOIAonline.regulations.gov)), consistent with 5 U.S.C. § 552(a)(2)(D).

4. Within 7 calendar days of the execution of this Stipulation, Defendants will provide the redacted disputed information, set forth at Exhibit A, in response to the FOIA requests identified in Paragraphs 1 and 3 above.

5. Within 7 calendar days of the execution of this Stipulation, Defendants will request in writing that the FOIA requesters in EPA-HQ-2012-001337 and EPA-HQ-2013-001516 return to EPA or destroy all copies of any previous responses to those FOIA requests and cease any further or ongoing dissemination of the same.

6. This Stipulation does not bind Defendants with respect to its response to any FOIA request other than the FOIA requests identified in Paragraphs 1 and 3 of this Stipulation. Within 7 calendar days of execution of this Stipulation, Defendants agree to provide written instruction to EPA's Regional and Headquarters FOIA coordinators that if they receive a FOIA request seeking the disputed information, as defined above, they are to respond by referring the requester(s) to FOIAonline and referencing the response provided to EPA-HQ-2012-001337 and EPA-HQ-2013-001516. This instruction will also be included in the training described below in paragraph 7.

7. Defendants agree to conduct training for managers in EPA's Office of Water and Regional and Headquarters FOIA coordinators regarding the Agency's obligations under the FOIA and the Privacy Act. Among other things, the training will focus on Exemption 6 of the FOIA, the Privacy Act, and other relevant privacy issues. The training will be conducted in the 2017 calendar year.

8. Plaintiffs agree to dismiss this lawsuit with prejudice. Such dismissal shall be effected via the stipulation of voluntary dismissal with prejudice per Fed. R. Civ. P. 41(a)(1)(A)(ii) that is attached hereto as Exhibit B. The parties shall file with the Court such stipulation of dismissal within ten business days of execution of this Stipulation.

9. This Stipulation constitutes the full and complete satisfaction of any and all claims on behalf of Plaintiffs arising from (a) the allegations set forth in the complaint filed in this lawsuit and (b) any litigation or administrative proceeding that Plaintiffs have brought, could bring, or could have brought against Defendants regarding the specific FOIA requests identified in Paragraphs 1 and 3 of this Stipulation, including all claims for attorneys' fees and costs. Any and all remaining claims and issues in this litigation are released and waived by all parties.

10. This Stipulation does not constitute an admission of liability or fault on the part of Defendants, the EPA, or its agents, servants, or employees, and this Stipulation shall not be construed as an admission of liability or fault. This Stipulation is entered into by both parties for the sole purpose of compromising disputed claims and avoiding the expenses and risks of further litigation. This Stipulation will not be used in any manner to establish liability for fees, amounts, or hourly rates, in any other case or proceeding.

11. This Stipulation is binding upon and inures to the benefit of the parties hereto and their respective successors and assigns.

12. Each party will bear its own attorney's fees and costs.

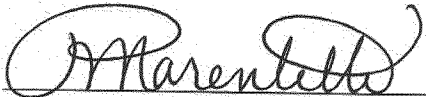
13. The undersigned attorneys are authorized to enter into this Stipulation of Settlement on behalf of their respective clients.

14. This Stipulation may be executed in counterparts as if executed by both parties on the same document.

[Signatures next page]

U.S. ENVIRONMENTAL PROTECTION AGENCY &  
E. SCOTT PRUITT, ADMINISTRATOR

GREGORY G. BROOKER  
Acting United States Attorney  
District of Minnesota

BY:  DATE: March 23, 2017  
Pamela A. Marentette  
Assistant United States Attorney

AMERICAN FARM BUREAU FEDERATION

BY: \_\_\_\_\_ DATE: \_\_\_\_\_  
Ellen Steen,  
General Counsel & Secretary

NATIONAL PORK PRODUCERS COUNCIL

BY: \_\_\_\_\_ DATE: \_\_\_\_\_  
Michael Formica,  
Assistant Vice President & Counsel, Domestic Policy



**EARTHJUSTICE**

ALASKA CALIFORNIA FLORIDA MID-PACIFIC NORTHEAST NORTHERN ROCKIES  
NORTHWEST ROCKY MOUNTAIN WASHINGTON, DC INTERNATIONAL

**RECEIVED**  
SEP 12 2012

September 11, 2012

By Email: [hq.foia@epa.gov](mailto:hq.foia@epa.gov)

National Freedom of Information Officer  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue, NW (2822T)  
Washington, DC 20460  
(202) 566-1667 FAX (202) 566-2147  
E-mail: [hq.foia@epa.gov](mailto:hq.foia@epa.gov)

Re: Freedom of Information Request for information related to the withdrawal of the  
CAFO Reporting Rule

Dear Freedom of Information Officer:

Earthjustice submits this request for records in accordance with the provisions of the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. In accordance with FOIA, please provide us with the following records relating to the rule proposed by the Environmental Protection Agency ("EPA") on October 21, 2011, under section 308 of the Clean Water Act, to collect information about concentrated animal feeding operations (CAFOs) (the "CAFO Reporting Rule"), and the withdrawal of the CAFO Reporting Rule announced by EPA on July 20, 2012:

1. All records, including all communications, shared or otherwise maintained between EPA and any other governmental agency (including, but not limited to, the United States Department of Agriculture and/or the United States Geological Survey) relating to the CAFO Reporting Rule and/or the 2012 withdrawal of the CAFO Reporting Rule ;
2. All records reflecting any communication, written or verbal, between the EPA and any private party, corporation or non-profit organization (including, but not limited to, the National Pork Producers Council, the American Farm Bureau Federation, the National Chicken Council, the U.S. Poultry & Egg Association, and the National Milk Producer's Federation) relating to the CAFO Reporting Rule and/or the 2012 withdrawal of the CAFO Reporting Rule;
3. All records created or updated since November 28, 2008, relating to EPA's evaluation of information publicly available about CAFOs in the United States.
4. All records, including, but not limited to, all communications and records identifying, discussing, mentioning, describing, reporting or analyzing, the July 2012 memorandum of understanding (MOU) entitled "Collaborative Efforts to Collect and

156 WILLIAM STREET SUITE 800 NEW YORK, NY 10038  
T: 212.791.1881 F: 212.918.1556 E: [neoffice@earthjustice.org](mailto:neoffice@earthjustice.org) W: [www.earthjustice.org](http://www.earthjustice.org)

Exchange Information about Concentrated Animal Feeding Operations” entered into between EPA and the Association of Clean Water Administrators;

5. All records relating to how EPA will obtain information about CAFOs in states for which current site-specific information about CAFOs is not available on the internet, including, at a minimum, CAFOs in Maine, Massachusetts, New Hampshire, Rhode Island, Vermont, Puerto Rico, U.S. Virgin Islands, West Virginia, Georgia, Illinois, Minnesota, Kansas, Nevada, Alaska, Idaho, and Washington;
6. All records relating to and/or identifying existing sources of information about CAFOs, including the AFOs themselves, and EPA’s proposed and intended data collection process for gathering that information.

The use of the word “record” above includes, but is not limited to, documents in all forms (including electronic), information, emails, faxes, letters, comments, reports, summaries of telephone conversations, handwritten notes, meeting minutes, or any other materials. **EPA need not produce documents that are part of the docket for the CAFO Reporting Rule (Docket EPA-HQ-QW-2011-0188) as posted on Regulations.gov.**

The use of the word “unredacted” above means that we are seeking full disclosure of all information in the requested record. In the event that you determine that you can disclose only some of the information contained in a record that falls within the scope of this request, please provide us with a copy of the record with only the information that you have determined to be properly treated as confidential redacted.

If any information requested herein was, but is no longer, in EPA’s possession or subject to its control, state whether it is (a) missing or lost, (b) has been destroyed, (c) has been transferred voluntarily or involuntarily to others, or (d) otherwise disposed of, and in each instance, explain the circumstances surrounding and authorization for such disposition of it and state the date or approximate date of it.

If you claim that any of the foregoing information is exempt from mandatory disclosure, we respectfully request that you:

- (1) Provide an index of all documents containing the requested information, reflecting the date, author, addressee, number of pages, and subject matter of such documents;
- (2) State the exemption you deem to be applicable to each information request;
- (3) State with particularity the reason why such exemption is applicable to each information request;
- (4) Examine each information request to determine if reasonably segregable non-exempt information exists which may be released after redacting information deemed to be exempt; and
- (5) Exercise your discretion to release such records notwithstanding the availability of a basis for withholding.

#### **FEE WAIVER REQUEST**

Pursuant to 5 U.S.C. § 552(a)(4)(A)(iii), we request a fee waiver because “disclosure of the requested information is in the public interest because it is likely to contribute significantly to

public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” *Id.* As demonstrated below, each of the four factors related to the first fee waiver requirement, as specified in EPA’s FOIA regulations at 40 C.F.R. § 2.107(l)(2)(i)-(iv), weigh in favor of granting our fee waiver request.

***Factor 1: The Requested Records Concern the Operations or Activities of the Federal Government.***

The subject matter of the requested records concerns “identifiable operations or activities of the Federal government,” 40 C.F.R. § 2.107(l)(2)(i), insofar as the requests relate to EPA’s proposal to promulgate the CAFO Reporting Rule and its subsequent decision to withdraw is proposal to promulgate such a rule.

***Factor 2: Disclosure of the Requested Records is Likely to Contribute to Public Understanding of Government Operations or Activities.***

Disclosure of the requested records is “likely to contribute” to an “increased public understanding,” 40 C.F.R. § 2.107(l)(2)(ii), of government operations or activities because such disclosure will enable the requester to understand why EPA decided to withdraw the CAFO Reporting Rule, and how EPA expects to be able to develop facility-specific information about all the CAFOs in the United States, including facility location and basic operational characteristics that relate to how and why a facility may discharge, without requiring CAFOs to report this information to EPA. This information is not already accessible through EPA’s website. See Factor 4, below.

***Factor 3: Disclosure of the Requested Records Will Contribute to the Understanding of a Broad Audience of Persons Interested in How the Government Decided Not to Require CAFOs to Report and in How the Government Will Identify CAFOs that Are Discharging, But Are Not in the NPDES Program***

Disclosure will “contribute to the understanding of a reasonably broad audience of persons interested in” learning about the Government’s efforts to regulate CAFOs under the Clean Water Act, and how EPA can comply with its mandates under the Clean Water Act without gathering the information it would have received under the CAFO Reporting Rule. This is because Earthjustice, the requesting organization, is a national nonprofit environmental law firm which has made safeguarding the environment, including especially the nation’s waters, one of its top priorities and has developed expertise in this area. In order to further its work to protect the nation’s waters, Earthjustice has brought numerous lawsuits seeking to enforce the Clean Water Act, and filed several Clean Water Act petitions with EPA. See, e.g., *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*, 557 U.S. 261 (2009) (counsel of record for respondents Southeast Alaska Conservation Council, et al. in case involving the discharge of wastewater into Lower Slate Lake); *Friends of Everglades v. South Florida Water Management Dist.*, 570 F.3d 1210 (11th Cir. 2009) (representing plaintiffs in case involving pumping of polluted water into Lake Okeechobee); *Petition under the Clean Water Act to Establish Toxicity Criteria and Require Toxicity Testing and Public Disclosure of Ingredients for Products on the National Contingency Plan Product Schedule* (Oct. 13, 2010),



[http://earthjustice.org/sites/default/files/files/dispersant\\_petition\\_0.pdf](http://earthjustice.org/sites/default/files/files/dispersant_petition_0.pdf). In addition, Earthjustice has filed or intervened in several lawsuits involving pollution emanating from CAFOs. *See, e.g., Waterkeeper Alliance v. EPA*, No. 09-1017 (D.C. Cir. Jan. 15, 2009) (representing petitioners in challenge to regulations exempting from reporting air releases of hazardous substances from animal waste at farms); *Rose Acre Farms, Inc. v. NC Department of Environment and Natural Resources*, No. 12-CVS-10 (Super. Ct. Hyde Cty March 2, 2012) (representing intervenors on side of State agency defending decision to require egg CAFO to operate under NPDES permit). Because of our expertise in this area, Earthjustice is well-prepared to analyze and evaluate the records we receive pursuant to this request and assess them in the context of the statutory mandates of the Clean Water Act and the information already available to EPA about CAFOs, and determine whether EPA's can fulfill its Clean Water Act obligations with respect to CAFOs in light of the decision to withdraw the CAFO Reporting Rule.

In addition to being able to analyze the information provided to determine whether EPA's actions can be reconciled with its obligations under the Clean Water Act, Earthjustice has the "ability and intention to convey this information to the public." 40 C.F.R. § 2.107(l)(2)(iii). Earthjustice can publicize information received from this request – and its analysis of whether the withdrawal of the CAFO Reporting Rule is consistent with the EPA's Clean Water Act's mandates -- in its monthly electronic newsletter, which serves approximately 223,000 subscribers. Earthjustice also can utilize its online action alert system to urge members of the public to contact policymakers and ask them to take action based on information received from this request; typically, 15,000 to 20,000 individuals respond to such alerts. Finally, Earthjustice's full-time health campaigner can disseminate newsworthy information obtained from this request to the media, and Earthjustice's full-time health lobbyist can provide relevant information obtained from this request to elected officials in Washington..

***Factor 4: The Contribution to Public Understanding of Government Operations or Activities Will Be Significant.***

The public's understanding of government operations or activities related to EPA's knowledge of pollution caused by CAFOs and whether EPA has an adequate plan for determining which CAFOs are discharging pollutants into waters of the United States, "as compared to the level of public understanding existing prior to disclosure, [will] be enhanced by the disclosure to a significant extent." 40 C.F.R. § 2.107(l)(2)(iv). Because so little is publicly known or understood about EPA's plan for learning about, and addressing, discharges from CAFOs in the absence of the CAFO Reporting Rule, public understanding of these efforts will undoubtedly be enhanced to a significant extent by disclosures in response to this request.

In addition, the second fee waiver requirement – that the request "is not primarily in the commercial interest of the requester," 40 C.F.R. § 2.107(l)(1) – is also met here. The requester, Earthjustice, is a 501(c)(3) nonprofit organization and does not have any "commercial interest that would be furthered by the requested disclosure" of information.<sup>1</sup> 40 C.F.R. § 2.107(l)(3)(i).

<sup>1</sup> Indeed, the legislative history of the fee waiver provision reveals that it was added to FOIA "in an attempt to prevent government agencies from using high fees to discourage certain types of requesters, and requests," in particular those from journalists, scholars and nonprofit public interest groups. *See Ettlinger v. FBI*, 596 F. Supp. 867, 872 (D. Mass. 1984).

Indeed, Requester's sole interest in obtaining the requested information is to broaden public understanding of why EPA withdrew the CAFO Reporting Rule, and whether EPA has a reasonable plan in place to learn about which CAFOs are likely discharging, and to undertake advocacy efforts related to improving EPA's regulation of CAFOs under the Clean Water Act, if appropriate.

In sum, this request meets the requirements for a fee waiver. In the event that fees are not waived, please notify and inform us of the basis for your decision.

#### INSTRUCTIONS FOR RECORD DELIVERY

To the extent that the requested records are available in a readily accessible electronic format, we would prefer to receive the documents electronically, either by email or on a CD. If electronic copies are unavailable, we will accept paper copies. Please send records to Eve C. Gartner at [egartner@earthjustice.org](mailto:egartner@earthjustice.org), or mail them to:

Eve C. Gartner, Esq.  
Earthjustice  
156 William St., Suite 800  
New York, NY 10038-5326

As FOIA requires, we expect your response within twenty working days of your receipt of this request. In the event that you have any questions concerning the type of materials we are interested in receiving, please contact me by email or by telephone at 212-791-1881 ext. 8222.

Thank you for your assistance in this matter.

Sincerely,



Eve C. Gartner

RECEIVED  
SEP 12 2012



new FOIA request  
Eve C. Gartner to: FOIA HQ

09/12/2012 10:07 AM

Dear Sir or Madam –

Attached please find a FOIA request related to the withdrawal by EPA of the CAFO Reporting Rule announced on July 20, 2012.

Many thanks for your attention to this matter.

Eve Gartner

Eve C. Gartner  
Staff Attorney  
Earthjustice  
156 William Street  
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New York, New York 10038  
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Because the earth needs a good lawyer

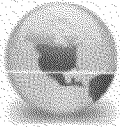
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FOIA to EPA - Withdrawal of Reporting Rule-final.pdf

**APPENDIX B: NRDC/PEW FOIA Request (EPA-HQ-2013-001516)**



**FOIA Request- NRDC and Pew Charitable Trusts**  
Althouse, Claire to: FOIA HQ  
Cc: "Devine, Jon", Julie Janovsky , Nathaniel Keller

10/24/2012 06:16 PM

To Whom It May Concern:

I write on behalf of the Natural Resources Defense Council and the Pew Charitable Trusts to request disclosure of records pursuant to the Freedom of Information Act and EPA FOIA regulations. Attached, please find a copy of correspondence mailed today concerning the above-mentioned request.

Sincerely,

Claire Althouse

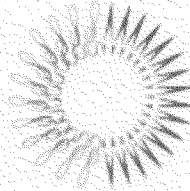
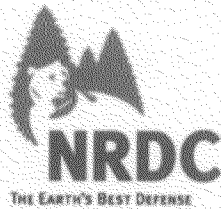
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Claire Althouse  
Policy Analyst • Water Program  
Natural Resources Defense Council  
1314 Second Street  
Santa Monica, CA 90401  
T: (310) 434-2300  
F: (310) 434-2399

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Pew-NRDC CAFO FOIA 10-24-12.pdf



THE  
**PEW**  
CHARITABLE TRUSTS

October 24, 2012

*Via Regular Mail and Electronic Mail to:*

National Freedom of Information Officer  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue, NW (2822T)  
Washington, DC 20460  
E-mail: [hq.foia@epa.gov](mailto:hq.foia@epa.gov)

**Re: Freedom of Information Act Request for Records Related to EPA's Ability to  
Protect the Public from Concentrated Animal Feeding Operations' Pollution**

**To Whom It May Concern:**

On behalf of the Natural Resources Defense Council ("NRDC") and the Pew Charitable Trusts, we write to request disclosure of records pursuant to the Freedom of Information Act ("FOIA"),<sup>1</sup> and the Environmental Protection Agency ("EPA") FOIA regulations.<sup>2</sup>

NRDC is comprised of more than 1.3 million members and online activists and over 350 lawyers, scientists, and advocates who are committed to protecting our natural resources for health and future generations. This includes protecting our nation's water supply from pollution caused by animal agriculture.

The Pew Charitable Trusts' Campaign to Reform Industrial Animal Agriculture is dedicated to advancing pollution control policies to mitigate waste from animal agriculture and create a new system that is less damaging to the environment, rural communities and human health.

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<sup>1</sup> 5 U.S.C. § 552.

<sup>2</sup> 40 C.F.R. 2.100 ff.

## **I. Description of Records Sought**

NRDC and the Pew Charitable Trusts ask that EPA please produce all records<sup>3</sup> in EPA's possession, custody or control relating to EPA's withdrawal of the proposed National Pollutant Discharge Elimination System ("NPDES") Concentrated Animal Feeding Operation ("CAFO") Reporting Rule ("Reporting Rule").<sup>4</sup>

These records should include, without limitation:

1. Any records pertaining to the Reporting Rule that are not contained in the public docket for that rule that were submitted to EPA by: The American Farm Bureau Federation, The National Pork Producers Council, The National Cattlemen's Beef Association, The United Egg Producers, The U.S. Poultry & Egg Association, The National Council of Farmer Cooperatives, The National Milk Producers Federation, The National Chicken Council, the National Turkey Federation, The National Corn Growers Association, or any other agricultural trade association.
2. Any records providing factual information concerning the completeness, accuracy, and public accessibility of states' CAFO information in the following areas:
  - a. The legal name of the owner of the CAFO or an authorized representative, their mailing address, email address, and primary telephone number,
  - b. The legal name and address of the CAFO owner/operator, if the name and address of an authorized representative is provided above,
  - c. The location of the CAFO's production area, identified by latitude and longitude and street address,
  - d. If the owner or operator has NPDES permit coverage, the date of issuance of coverage under the NPDES permit, and the permit number,
  - e. For the previous 12-month period, identification of each animal type confined either in open confinement including partially covered area, or housed totally under roof at the CAFO for 45 days or more, and the maximum number of each animal type confined at the CAFO for 45 days or more,
  - f. Where the owner or operator land applies manure, litter, and process wastewater, the total number of acres under the control of the owner or operator available for land application,
  - g. If the CAFO is a contract operation, the name and address of the integrator,

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<sup>3</sup> The term "records" is used herein to mean anything denoted by the use of that word or its singular form in the text of FOIA. In particular, the term includes, but is not limited to, all writings (handwritten, typed, electronic, or otherwise produced, reproduced, or stored) including, but not limited to, correspondence, minutes of meetings, memoranda, notes, e-mails, notices, facsimiles, charts, tables, presentations, orders and filings.

<sup>4</sup> National Pollutant Discharge Elimination System (NPDES) Concentrated Animal Feeding Operation (CAFO) Reporting Rule, 76 Fed. Reg. 65,431 (Oct. 21, 2011) (Docket No. EPA-HQ-OW-2011-0188) [hereinafter *CAFO Reporting Rule*].



- h. Type and capacity of manure storage used at the CAFO,
  - i. Quantity of manure, process wastewater, and litter generated annually by the CAFO,
  - j. If the CAFO land-applies, whether it implements a nutrient management plan for land application,
  - k. If the CAFO land-applies, whether it employs nutrient management practices and keeps records on site consistent with 40 CFR 122.23(e),
  - l. If the CAFO does not land apply, alternative uses of manure, litter and/or wastewater, and
  - m. Whether the CAFO transfers manure off site, and if so, the quantity transferred to recipient(s) of transferred manure.
3. Any records that provide any of items 2.a-m, above, for any CAFO in the U.S.

## II. Request for Fee Waiver

NRDC and the Pew Charitable Trusts request that EPA waive the fee that it would otherwise charge for search and production of the records described above. FOIA dictates that requested records be furnished without any charge or at a reduced charge if A) "disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operation or activities of the government," and B) "is not primarily in the commercial interest of the requester."<sup>5</sup> The requested disclosure would meet both of these requirements. In addition, NRDC qualifies as a "representative of the news media" entitled to a reduction of fees under FOIA.<sup>6</sup>

### A. Disclosure is in the Public Interest and would Contribute Significantly to Public Understanding of the Operations of the Government

FOIA dictates that a fee waiver should be granted when a disclosure is "likely to contribute significantly to public understanding of the operations or activities of the government."<sup>7</sup> The records described above shed light on a matter of considerable public interest and concern: the extent to which EPA has the capacity to effectively mitigate water pollution from CAFOs.

As EPA pointed out in the proposed Reporting Rule, "pollutants from manure, litter, and process wastewater can affect human health and the environment."<sup>8</sup> EPA noted that "despite more than 35 years of regulating CAFOS, reports of water quality impacts from large animal feeding

<sup>5</sup> 5 U.S.C. § 552(a)(4)(A)(iii); 40 CFR 2.107(l).

<sup>6</sup> 5 U.S.C. § 552(a)(4)(A)(ii)(II); 40 CFR 2.107(d).

<sup>7</sup> 5 U.S.C. § 552(a)(4)(A)(iii); 40 CFR 2.107(l).

<sup>8</sup> CAFO Reporting Rule, *supra* note 4, at 65,433.

operations persist.”<sup>9</sup> Pollutants commonly found in CAFO waste include nutrients, pathogens, heavy metals, and pharmaceuticals.<sup>10</sup> These pollutants cause toxic algal blooms, human disease, and human reproductive problems.<sup>11</sup> It is of great public concern that waste containing these pollutants is effectively managed and contamination of water resources is avoided.

The Government Accountability Office recommended in a 2008 report to Congress that EPA “should complete the Agency’s effort to develop a national inventory of permitted CAFOs” because “EPA has neither the information it needs to assess the extent to which CAFOs may be contributing to water pollution, nor the information it needs to ensure compliance with the Clean Water Act.”<sup>12</sup> EPA withdrew the Reporting Rule, which would have gathered information EPA needs to perform its duty of protecting public health and water quality. It is therefore in the public interest to determine what “operations or activities” the EPA plans to use to deal with the staggering lack of information about CAFOs and the persistent pollution affiliated with these facilities.

The tailored request in this letter seeks disclosure of important records concerning EPA’s activities that will contribute meaningfully and significantly to public understanding of CAFO pollution. Disclosure of these records will contribute “significantly” to public understanding because NRDC and the Pew Charitable Trusts will disseminate summary and analysis of any newsworthy information conveyed in the requested records.

As a not for profit organization, the Pew Charitable Trusts is well-equipped to analyze and disseminate the requested information, and may use this information to contribute to the public’s understanding of the EPA’s withdrawal of the proposed NPDES CAFO Reporting Rule. The Pew Charitable Trusts could disseminate that information in a number of ways including through the Pew Charitable Trusts’ website, <http://www.pewtrusts.org>, Pew Environment Group’s website, <http://www.pewenvironment.org>, and its publication *The Latest*, which has a circulation of nearly 120,000 people. In addition, it could distribute the information through the state and national media by way of press releases or other media for general public consumption.

NRDC publishes information in its magazine, *OnEarth*, which is distributed to over 150,000 subscribers, for sale to newsstands and bookstores, and free of charge at <http://www.nrdc.org/onearth>. NRDC also has the ability to disseminate information on CAFO pollution through its website, <http://www.nrdc.org>, which is updated daily and draws approximately 2.5 million page views and 700,000 visits per month; its *Nature’s Voice* newsletter on current environmental issues, distributed five times a year to NRDC’s

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<sup>9</sup> Id.

<sup>10</sup> Id.

<sup>11</sup> Id.

<sup>12</sup> U.S. Gov’t Accountability Office, *Concentrated Animal Feeding Operations: EPA Needs More Information and a Clearly Defined Strategy to Protect Air and Water Quality*, GAO-08-944 5 (2008), page 48.



approximately 650,000 members and online at <http://www.nrdc.org/naturesvoice/>, and other newsletters and alerts. NRDC's *Earth Action* email list has more than 165,000 subscribers who receive biweekly information on urgent environmental issues. This information is also made available through NRDC's online Action Center at <http://www.nrdc.org/legislation/legwatch.asp>. *This Green Life* is an electronic newsletter on environmentally sustainable living distributed by email to 55,000 subscribers and made available online at <http://www.nrdc.org/thisgreenlife/>. NRDC issues press releases; participates in press conferences and interviews with reporters and editorial writers; and has over twenty staff members dedicated to communications work.<sup>13</sup> Finally, NRDC employees provide Congressional testimony, appear on television, radio, and web broadcasts and at conferences; and contribute to numerous national newspapers, magazines, academic journals, other periodicals, and books.<sup>14</sup>

NRDC routinely uses FOIA to obtain information from federal agencies that NRDC legal and scientific experts analyze in order to inform the public about a variety of issues including energy policy, climate change, wildlife protection, nuclear weapons, pesticides, drinking water safety, and air quality. Some specific examples are provided below:

1. NRDC obtained through a court-enforced FOIA request records of the operations of Bush Administration's Energy Task Force, headed by Vice President Dick Cheney. It made those records available, along with analysis of selected excerpts and links to the administration's index of withheld documents, on NRDC's website at <http://www.NRDC.org/air/energy/taskforce/tfinx.asp>. NRDC's efforts helped to inform the public about an issue that, even before the records' release, had attracted considerable attention.<sup>15</sup>
2. NRDC obtained through a FOIA request a memorandum by ExxonMobil advocating the replacement of a highly respected atmospheric scientist, Dr. Robert Watson, as the head of the Intergovernmental Panel on Climate Change. NRDC used this memorandum to

<sup>13</sup> See "Communications" staff list at <http://www.nrdc.org/about/staff.asp>.

<sup>14</sup> See, e.g., Tammy Weber, *EPA Can't Regulate Livestock Farms it Can't Find*, Huffington Post, [http://www.huffingtonpost.com/2012/08/02/epa-cant-regulate-livesto\\_n\\_1732414.html](http://www.huffingtonpost.com/2012/08/02/epa-cant-regulate-livesto_n_1732414.html) (Aug. 2, 2012) (quoting NRDC Senior Attorney Jon Devine); Kristin Eberhard and Evan Gillespie, "How LADWP can do right by Angelenos," Op-Ed, L.A. Times (Sept. 11, 2012) (co-authored by NRDC Western Energy and Climate Program Legal Director Kristin Eberhard); Alice Park, "Waste Not," Time Magazine (Sept. 10, 2012) (quoting NRDC Senior Scientist Allen Hershkowitz); Steve Scher, "Food: Why Americans Waste So Much and Ways to Stop," KOUW (Seattle Public Radio), Aug. 30, 2012 (featuring NRDC Scientist Dana Gunders); "Weighing Benefits and Pitfalls of Increased Oil and Gas Production in the U.S.," PBS NewsHour, Aug. 10, 2012 (featuring NRDC Senior Attorney Kate Sinding); "Clean Air in California: What's it Going to Take?" 2012 Environmental Law Conference at Yosemite, Oct. 28, 2012 (featuring NRDC Attorney Adrian Martinez).

<sup>15</sup> See, e.g., Elizabeth Shogren, *Bush Gets One-Two Punch on Energy*, L.A. Times (Mar. 28, 2002), at A22; Bennett Roth, *Houston Energy-Drilling Firm Appears in Documents from Energy Department*, Houston Chronicle (Apr. 12, 2002).

help inform the public about what may have been behind the decision by the Bush Administration to replace Dr. Watson.<sup>16</sup>

3. NRDC incorporated information obtained through FOIA into a 2005 report, published and provided free of charge at NRDC's website,<sup>17</sup> on the impacts of military sonar and other industrial noise pollution on marine life.<sup>18</sup>

Disclosure of the requested documents is "likely to contribute significantly to public understanding" of EPA's activities concerning CAFO pollution<sup>19</sup> because NRDC intends to disseminate any newsworthy information in the released records, and its analysis of such records, to its member base and to the broader public, through one or more of the many communications channels referenced above. As NRDC's long history of incorporating information obtained through FOIA into reports, articles, and other communications illustrates, NRDC is well prepared to convey to the public any relevant information it obtains through this records request.

**B. NRDC and the Pew Charitable Trusts have no Commercial Interest that would be Furthered by the Requested Information**

Disclosure in this case would also satisfy the second prerequisite of a fee waiver request<sup>20</sup> because "Congress amended FOIA to ensure that it be 'liberally construed in favor of waivers for noncommercial requesters.'"<sup>21</sup> NRDC and the Pew Charitable Trusts are not-for-profit organizations and, as such, have no commercial interest.

NRDC's and the Pew Charitable Trusts' primary interest in obtaining the above records is to serve the public by disclosing presently non-public information about EPA's ability to protect the public from CAFO pollution. As previously discussed, CAFOs are a significant source of water pollution, and waste from CAFOs contains substances that are hazardous to humans and the environment. Because CAFOs are potentially so harmful to human health and natural places, it is in the public interest to examine how EPA plans to protect against the harmful effects of CAFO pollution.

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<sup>16</sup> See NRDC Press Release and Exxon memorandum, "Confidential Papers Show Exxon Hand in White House Move to Oust Top Scientist from International Global Warming Panel," (Apr. 3, 2002); Elizabeth Shogren, *Charges Fly Over Science Panel Pick*, L.A. Times (Apr. 4, 2002).

<sup>17</sup> See <http://www.nrdc.org/wildlife/marine/sound/contents.asp>.

<sup>18</sup> See NRDC, *Sounding the Depths II* (Nov. 2005) (update to a 1999 report). Since the report's publication, the sonar issue has continued to attract widespread public attention. See, e.g., D. Fleshler, "Navy testing could devastate whales and dolphins, groups say," Ft. Lauderdale Sun Sentinel, July 13, 2012.

<sup>19</sup> 5 U.S.C. § 552(a)(4)(A)(iii).

<sup>20</sup> 5 U.S.C. § 552(a)(4)(A)(iii); 40 CFR 2.107(l)(3).

<sup>21</sup> *Judicial Watch v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003) (internal citation omitted).

### **C. NRDC is a Media Requester**

Even if EPA denies a public interest waiver of all costs and fees, NRDC is a representative of the news media entitled to a reduction of fees under FOIA.<sup>22</sup> As described previously in this request, NRDC publishes a quarterly magazine, *OnEarth*, which has more than 150,000 subscribers and is available at newsstands and bookstores; publishes a periodic newsletter for its more than 650,000 members nationally; issues regular electronic newsletters, action alerts, public reports and analyses; and maintains a free online library of reports and analyses. These publications routinely include information about current events of interest to the readership and the public. NRDC staff members are also regular contributors to numerous periodicals, books, and the NRDC Switchboard blog, <http://www.switchboard.nrdc.org/>; television, radio, and web programs; and hearings and conferences. CAFO pollution specifically has been featured in some of NRDC's media outlets.<sup>23</sup> As previously noted, information obtained as a result of this request will, if appropriately newsworthy, be disseminated through one or more of NRDC's publications or other suitable channels.

### **III. Willingness to Pay Fees Under Protest**

Please provide the records above irrespective of the status and outcome of your evaluation of NRDC's and the Pew Charitable Trusts' fee category assertion and fee waiver request. In order to prevent delay in EPA's provision of the requested records, NRDC and the Pew Charitable Trusts state that they will, if necessary and under protest, pay fees in accordance with 40 CFR 2.107. Please consult with me, however, before undertaking any action that would cause the fee to exceed \$500. Such payment will not constitute any waiver of NRDC's and the Pew Charitable Trusts' right to seek administrative or judicial review of any denial of its fee waiver request and/or rejection of its fee category assertion.

---

<sup>22</sup> 5 U.S.C. § 552(a)(4)(A)(ii); 40 CFR 2.107(d).

<sup>23</sup> See, e.g., Posting of Jon Devine to NRDC Switchboard Blog, *EPA Chickens Out by Dropping Industrial Livestock Information Collection Effort*, (July 24, 2012), [http://switchboard.nrdc.org/blogs/jdevine/epa\\_chickens\\_out\\_by\\_dropping\\_i.html](http://switchboard.nrdc.org/blogs/jdevine/epa_chickens_out_by_dropping_i.html); Dan Rosen, *Cow Woes*, *OnEarth Magazine* (Aug. 26, 2012), available at <http://www.onearth.org/article/cow-woes>.

#### IV. Conclusion

We trust that, in responding to this request, EPA will comply with all relevant deadlines and other obligations set forth in FOIA and EPA's regulations.<sup>24</sup>

To the extent that the requested records are available in a readily accessible electronic format, we would prefer to receive documents electronically, either by email or on a CD. If electronic copies are unavailable, we will accept paper copies. Please send records to Jon Devine at [jdevine@nrdc.org](mailto:jdevine@nrdc.org), or mail them to:

Jon Devine  
NRDC  
1152 15<sup>th</sup> Street NW, Suite 300  
Washington, DC 20005

Please produce records on a rolling basis; at no point should EPA's search for or deliberations concerning certain records delay the production of others that EPA has already retrieved and is obliged to produce.

In the event that EPA concludes that some of the records requested above may already be publicly available, we will be happy to discuss those conclusions in an effort to narrow the scope of this request.

Thank you for your prompt attention to this request.

Sincerely,



**Jon P. Devine, Jr.**  
Senior Attorney  
Natural Resources Defense Council  
202-289-6868  
[jdevine@nrdc.org](mailto:jdevine@nrdc.org)



**Karen Steuer**  
Director, Government Relations  
Pew Environment Group  
202-887-8818  
[ksteuer@pewtrusts.org](mailto:ksteuer@pewtrusts.org)

---

<sup>24</sup> See 5 U.S.C. § 552; 40 CFR 2.100 ff.

**To:** Gottesman, Larry[Gottesman.Larry@epa.gov]; Blake, Wendy[Blake.Wendy@epa.gov]; Molloy, Jennifer[molloy.jennifer@epa.gov]; Nagle, Deborah[Nagle.Deborah@epa.gov]  
**Cc:** Miller, Kevin[Miller.Kevin@epa.gov]  
**From:** Nguyen, Quoc  
**Sent:** Thur 3/30/2017 1:52:02 PM  
**Subject:** Latest version of the letter and instructions  
EPA-HQ-2013-001516 Draft FOIA Response 3-30-17.docx.docx  
DRAFT Instructions for Handling CAFO Information Related to AFBF 3-30-17.docx

Ex. 5 - Deliberative Process, ACC, AWP

Dear All:

Attached for your final review and edits. I hope to get this to OWM and Larry Gottesman by early afternoon.

Thanks,

Quoc

Quoc P. Nguyen

Office of General Counsel

U.S. Environmental Protection Agency

1200 Pennsylvania Avenue, NW

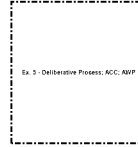
Washington, DC 20460

202-564-6343

PRIVILEGED COMMUNICATION for internal deliberation only; may contain deliberative, attorney-client, attorney work product, or otherwise privileged material; do not distribute outside EPA or DOJ.



**To:** Blake, Wendy[Blake.Wendy@epa.gov]; Neugeboren, Steven[Neugeboren.Steven@epa.gov]  
**Cc:** Levine, MaryEllen[levine.maryellen@epa.gov]; Kupchan, Simma[Kupchan.Simma@epa.gov];  
Miller, Kevin[Miller.Kevin@epa.gov]; Nagle, Deborah[Nagle.Deborah@epa.gov]; Molloy,  
Jennifer[molloy.jennifer@epa.gov]  
**From:** Nguyen, Quoc  
**Sent:** Tue 3/28/2017 5:32:00 PM  
**Subject:** FOR YOUR REVIEW: AFBF v. EPA Draft FOIA Instructions and Letter to FOIA Requesters  
AFBF v. EPA settlement agreement PM signature 3-23-17.pdf  
DRAFT Instructions for Handling CAFO Information Related to AFBF 3-28-17.docx  
EPA-HQ-2013-001516 Draft FOIA Response 3-27-17.docx



Hi Wendy and Steve,

Attached are two items for your immediate review:

- 1) FOIA Instructions for FOIA Coordinators and Officers
- 2) Letter to the two original FOIA Requesters asking to destroy or return the information

**Deadline for Review: COB WEDNESDAY, March 29, 2017** (I'm sorry for this tight turnaround. The documents are pretty short.)

I am also attaching the final settlement agreement for your reference.

Sincerely,

Quoc

Quoc P. Nguyen

Office of General Counsel

U.S. Environmental Protection Agency

1200 Pennsylvania Avenue, NW

Washington, DC 20460

202-564-6343

PRIVILEGED COMMUNICATION for internal deliberation only; may contain deliberative, attorney-client, attorney work product, or otherwise privileged material; do not distribute outside EPA or DOJ.



**To:** Nguyen, Quoc[Nguyen.Quoc@epa.gov]; Neugeboren, Steven[Neugeboren.Steven@epa.gov]  
**Cc:** Levine, MaryEllen[levine.maryellen@epa.gov]; Kupchan, Simma[Kupchan.Simma@epa.gov];  
Miller, Kevin[Miller.Kevin@epa.gov]; Nagle, Deborah[Nagle.Deborah@epa.gov]; Molloy,  
Jennifer[molloy.jennifer@epa.gov]  
**From:** Blake, Wendy  
**Sent:** Wed 3/29/2017 9:49:11 PM  
**Subject:** RE: FOR YOUR REVIEW: AFBF v. EPA Draft FOIA Instructions and Letter to FOIA  
Requesters  
[EPA-HQ-2013-001516 Draft FOIA Response 3-27-17.docx WB edits.docx](#)  
[DRAFT Instructions for Handling CAFO Information Related to AFBF 3-28-17.docxWB.docx](#)



Quoc – Thanks for preparing the attached. I think these are close. See proposed revisions. Can we talk about my comments on the instructions tomorrow morning at 8:45?

Wendy

Wendy L. Blake

Associate General Counsel

General Law Office  
Office of General Counsel

U.S. Environmental Protection Agency  
phone: (202) 564-1821  
fax: (202) 564-5433

**From:** Nguyen, Quoc  
**Sent:** Tuesday, March 28, 2017 1:32 PM  
**To:** Blake, Wendy <Blake.Wendy@epa.gov>; Neugeboren, Steven  
<Neugeboren.Steven@epa.gov>  
**Cc:** Levine, MaryEllen <levine.maryellen@epa.gov>; Kupchan, Simma  
<Kupchan.Simma@epa.gov>; Miller, Kevin <Miller.Kevin@epa.gov>; Nagle, Deborah  
<Nagle.Deborah@epa.gov>; Molloy, Jennifer <molloy.jennifer@epa.gov>  
**Subject:** FOR YOUR REVIEW: AFBF v. EPA Draft FOIA Instructions and Letter to FOIA  
Requesters  
**Importance:** High

Hi Wendy and Steve,

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Sincerely,

Quoc

Quoc P. Nguyen

Office of General Counsel

U.S. Environmental Protection Agency

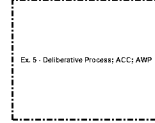
1200 Pennsylvania Avenue, NW

Washington, DC 20460

202-564-6343

PRIVILEGED COMMUNICATION for internal deliberation only; may contain deliberative, attorney-client, attorney work product, or otherwise privileged material; do not distribute outside EPA or DOJ.

**To:** Blair, Shirley[Blair.Shirley@epa.gov]  
**Cc:** Nguyen, Quoc[Nguyen.Quoc@epa.gov]  
**From:** Blake, Wendy  
**Sent:** Tue 3/28/2017 5:33:33 PM  
**Subject:** FW: FOR YOUR REVIEW: AFBF v. EPA Draft FOIA Instructions and Letter to FOIA Requesters  
[AFBF v. EPA settlement agreement PM signature 3-23-17.pdf](#)  
[DRAFT Instructions for Handling CAFO Information Related to AFBF 3-28-17.docx](#)  
[EPA-HQ-2013-001516 Draft FOIA Response 3-27-17.docx](#)



Shirley – Please print the attached email and documents for my review tonight.

Quoc – I will get you comments in the morning. I have time from 10-11 am to input any comments..

Wendy

Wendy L. Blake

Associate General Counsel

General Law Office  
Office of General Counsel

U.S. Environmental Protection Agency  
phone: (202) 564-1821  
fax: (202) 564-5433

**From:** Nguyen, Quoc  
**Sent:** Tuesday, March 28, 2017 1:32 PM  
**To:** Blake, Wendy <Blake.Wendy@epa.gov>; Neugeboren, Steven <Neugeboren.Steven@epa.gov>  
**Cc:** Levine, MaryEllen <levine.maryellen@epa.gov>; Kupchan, Simma <Kupchan.Simma@epa.gov>; Miller, Kevin <Miller.Kevin@epa.gov>; Nagle, Deborah <Nagle.Deborah@epa.gov>; Molloy, Jennifer <molloy.jennifer@epa.gov>  
**Subject:** FOR YOUR REVIEW: AFBF v. EPA Draft FOIA Instructions and Letter to FOIA Requesters  
**Importance:** High

Hi Wendy and Steve,

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**Deadline for Review: COB WEDNESDAY, March 29, 2017** (I'm sorry for this tight turnaround. The documents are pretty short.)

I am also attaching the final settlement agreement for your reference.

Sincerely,

Quoc

Quoc P. Nguyen

Office of General Counsel

U.S. Environmental Protection Agency

1200 Pennsylvania Avenue, NW

Washington, DC 20460

202-564-6343

PRIVILEGED COMMUNICATION for internal deliberation only; may contain deliberative, attorney-client, attorney work product, or otherwise privileged material; do not distribute outside EPA or DOJ.

**From:** Best-Wong, Benita

**Location:** Adobe Connect; Conference Line: Ex. 6 - Personal Privacy code: Ex. 6 - Personal Privacy

**Importance:** Normal

**Subject:** Mandatory Privacy Training (FOIA Exemption 6 and Privacy Act) for OW Managers

**Start Date/Time:** Tue 11/7/2017 5:00:00 PM

**End Date/Time:** Tue 11/7/2017 6:00:00 PM

Per a settlement agreement with American Farm Bureau Federation and National Pork Producer Council, managers in the Office of Water are required to participate in a one-hour training session on privacy, specifically Exemption 6 of the Freedom of Information Act and the Privacy Act. This webinar session will be conducted via Adobe Connect and will be recorded for those who cannot make this session. All OW managers must complete the training during this time or via the recorded session no later than **December 22, 2017**.

**Adobe Connect Link:** <http://epawebconferencing.acms.com/privacy/>

POCs: Jenny Molloy, OWM

Quoc Nguyen, OGC

**To:** Molloy, Jennifer[molloy.jennifer@epa.gov]  
**Cc:** Brennan, Ross[Brennan.Ross@epa.gov]; Subramanian, Hema[Subramanian.Hema@epa.gov]; Greenwald, Kathryn[Greenwald.Kathryn@epa.gov]; Ziobro, Joseph[Ziobro.Joseph@epa.gov]  
**From:** Galloway, Carol  
**Sent:** Tue 9/12/2017 5:20:43 PM  
**Subject:** FW: Topics for our CAFO call this week??

Thanks Jenny, this is really helpful.

Can you clarify what you mean by “run the particular responsive information through the usual checks and balances.” Also, if Regional folks want to take the training, would they be able to, or at least obtain the training material?

**From:** Molloy, Jennifer  
**Sent:** Tuesday, September 12, 2017 11:55 AM  
**To:** Galloway, Carol <Galloway.Carol@epa.gov>; Brennan, Ross <Brennan.Ross@epa.gov>; Subramanian, Hema <Subramanian.Hema@epa.gov>; Greenwald, Kathryn <Greenwald.Kathryn@epa.gov>; Ziobro, Joseph <Ziobro.Joseph@epa.gov>  
**Subject:** RE: Topics for our CAFO call this week??

Carol:

I could, but I'm at the R10 CAFO workshop this week and won't be available at 2 on Thursday.

The basic answer on this however is:

1. If we get specific requests for the information released to the requestor in the original FOIA request (NRDC/EJ and Pew) we will just refer them to the heavily redacted information released in those revised FOIA requests:

EPA-HQ-2012-001337

<https://foiaonline.regulations.gov/foia/action/public/view/request?objectId=090004d28000843a>



EPA-HQ-2013-001516

<https://foiaonline.regulations.gov/foia/action/public/view/request?objectId=090004d28001613d>

2. For any new requests we take them on a case-by-case basis and run the particular responsive information through the usual checks and balances, with emphasis on the privacy provisions for responding to FOIA requests. All OW managers will be taking training on that this fall, per one of the stipulations in the settlement agreement with AFBF. We obviously will be very careful and sensitive about how we respond, but each new FOIA request for CAFO-related info is independent of those involved in the AFBF v EPA case unless they specifically pertain to those at issue in the case.

Jenny Molloy

U.S. EPA

Water Permits Division

202.564.1939

[molloy.jennifer@epa.gov](mailto:molloy.jennifer@epa.gov)

**From:** Galloway, Carol

**Sent:** Tuesday, September 12, 2017 12:24 PM

**To:** Brennan, Ross <[Brennan.Ross@epa.gov](mailto:Brennan.Ross@epa.gov)>; Subramanian, Hema <[Subramanian.Hema@epa.gov](mailto:Subramanian.Hema@epa.gov)>; Molloy, Jennifer <[molloy.jennifer@epa.gov](mailto:molloy.jennifer@epa.gov)>; Greenwald, Kathryn <[Greenwald.Kathryn@epa.gov](mailto:Greenwald.Kathryn@epa.gov)>; Ziobro, Joseph <[Ziobro.Joseph@epa.gov](mailto:Ziobro.Joseph@epa.gov)>

**Subject:** Topics for our CAFO call this week??

## Ex. 5 - Deliberative Process

Ex. 5 - Deliberative Process

Any other topics??

Region 5 asked about our current policy on redacting farm info. I know Simma is out, can any of you address that?

Carol Galloway

913-551-5092

Pesticides, Waste and Toxics Branch

Monitoring, Assistance and Media Programs Division

Office of Compliance

*CAFO Coordinator*

*Tribal Pesticides*

*Worker Safety*

*Certification and Training*

*Pollinator Protection*

EPA National Ag Center

<http://www.epa.gov/agriculture>

Mailing address:

EPA R7 STC/Ag Center

300 Minnesota Ave.

Kansas City, KS 66101

**To:** Galloway, Carol[Galloway.Carol@epa.gov]; Adams, Margery[adams.margery@epa.gov]; Arvizu, Christy[Arvizu.Christy@epa.gov]; Atkinson, Benjamin[atkinson.ben@epa.gov]; Bahr, Ryan[bahr.ryan@epa.gov]; Berman, Michael[berman.michael@epa.gov]; Blanco-Gonzalez, Joel[Blanco-Gonzalez.Joel@epa.gov]; Boisclair, Diane[boisclair.diane@epa.gov]; Bonnelycke, Nina[Bonnelycke.Nina@epa.gov]; Breedlove, Dan[Breedlove.Dan@epa.gov]; Bukhari, Samir[Bukhari.Samir@epa.gov]; Burdett, Cheryl[burdett.cheryl@epa.gov]; Bush, William[Bush.William@epa.gov]; Campbell, Gwen[Campbell.Gwen@epa.gov]; Chang-Vaughan, Ellen[Chang-Vaughan.Ellen@epa.gov]; Chase, Felicia[chase.felicia@epa.gov]; Coats, Andrea[Coats.Andrea@epa.gov]; Cozad, David[Cozad.David@epa.gov]; Dart, Denny[Dart.Denny@epa.gov]; Davies, Lauris[Davies.Lauris@epa.gov]; Drelich, David[Drelich.David@epa.gov]; Duchovnay, Andrew[Duchovnay.Andrew@epa.gov]; Gable, Kelly[Gable.Kelly@epa.gov]; Greenberg, Ken[Greenberg.Ken@epa.gov]; Greenwald, Kathryn[Greenwald.Kathryn@epa.gov]; Hamera, Donald[Hamera.Don@epa.gov]; Heinemann, Kristina[Heinemann.Kristina@epa.gov]; Herbert, Rusty[Herbert.Rusty@epa.gov]; Hom, Michael[Hom.Michael@epa.gov]; Huffman, Diane[Huffman.Diane@epa.gov]; Jackson, Julia[Jackson.Julia@epa.gov]; Jann, Stephen[jann.stephen@epa.gov]; Joe, Don[Joe.Don@epa.gov]; Schefski, Melissa[Schefski.Melissa@epa.gov]; Kenknight, Jeff[Kenknight.Jeff@epa.gov]; Kermish, Laurie[Kermish.Laurie@epa.gov]; Kroening, Peg[Kroening.Margaret@epa.gov]; Kuefler, Patrick[kuefler.patrick@epa.gov]; Kupchan, Simma[Kupchan.Simma@epa.gov]; Kwok, Rose[Kwok.Rose@epa.gov]; Lane, Willie[Lane.Willie@epa.gov]; Lister, Chris[Lister.Chris@epa.gov]; Livingston, Peggy[Livingston.Peggy@epa.gov]; Lopez, Jaime[Lopez.Jaime@epa.gov]; Lukowich, Michael[lukowich.michael@epa.gov]; Massey, Michael[Massey.Michael@epa.gov]; McDonald, Scott[mcdonald.scott@epa.gov]; Mikalian, Charles[mikalian.charles@epa.gov]; Mitschele, Becky[Mitschele.Becky@epa.gov]; Modigliani, Justine[Modigliani.Justine@epa.gov]; Moody, Jonathan[moody.jonathan@epa.gov]; Moores, Steven[Moores.Steven@epa.gov]; Morgan, James[Morgan.James@epa.gov]; Mortensen, Ginah[mortensen.ginah@epa.gov]; Ogle, Kimberly[Ogle.Kimberly@epa.gov]; Oviedo, Luis[oviedo.luis@epa.gov]; Peak, Nicholas[Peak.Nicholas@epa.gov]; Plymale, Chris[Plymale.Christopher@epa.gov]; Pollard, Stephen[Pollard.Stephen@epa.gov]; Porter, Donna[Porter.Donna@epa.gov]; Potokar, Steven[Potokar.Steven@epa.gov]; Rogers, Joan[rogers.joan@epa.gov]; Roose, Rebecca[Roose.Rebecca@epa.gov]; Sampath, Sam[Sampath.Sam@epa.gov]; Saporita, Chris[Saporita.Chris@epa.gov]; Schwer, Don[Schwer.Don@epa.gov]; Segall, Martha[Segall.Marta@epa.gov]; Senkayi, Abu[Senkayi.Abu@epa.gov]; Silver, Wendy[Silver.Wendy@epa.gov]; Sipe, Diane[Sipe.Diane@epa.gov]; Socha, Julianne[socha.julianne@epa.gov]; Stokely, Peter[Stokely.Peter@epa.gov]; Sullivan, Tim[Sullivan.Tim@epa.gov]; Sutin, Elyana[Sutin.Elyana@epa.gov]; Theis, Joseph[Theis.Joseph@epa.gov]; Thomas, Lee[Thomas.Lee@epa.gov]; Thompson, Robert L.[thompson.robertl@epa.gov]; Thuot, Lisa[Thuot.Lisa@epa.gov]; Tipton, Lantz[tipton.lantz@epa.gov]; Urban, Trevor[Urban.Trevor@epa.gov]; Utting, George[Utting.George@epa.gov]; Vanlerberghe, Daren[Vanlerberghe.Daren@epa.gov]; VanTil, Barbara[vantil.barbara@epa.gov]; Vuilleumier, Kevin[vuilleumier.kevin@epa.gov]; Weiler, Eaton[weiler.eaton@epa.gov]; Whitson, Amelia[Whitson.Amelia@epa.gov]; Williams, Nancy[Williams.Nancy@epa.gov]; Wills, Carl[Wills.Carl@epa.gov]; Witt, Richard[Witt.Richard@epa.gov]; Zolandz, Mark[Zolandz.Mark@epa.gov]; Boeglin, Michael[Boeglin.Michael@epa.gov]; Vezner, Kris[vezner.kris@epa.gov]; Ibarra, Juan[Ibarra.Juan@epa.gov]; Draper, Seth[Draper.Seth@epa.gov]; Smith, Brittany[Smith.Brittany@epa.gov]; Arcaya, Alyssa[arcaya.alyssa@epa.gov]; Anderson, Kate[Anderson.Kate@epa.gov]; Wetherington, Michele[Wetherington.Michele@epa.gov]; Savino, Kathleen[Savino.Kathleen@epa.gov]; Chan, Janice[Chan.Janice@epa.gov]; Buterbaugh, Kristin[Buterbaugh.Kristin@epa.gov]; Goldstein, Jessica[goldstein.jessica@epa.gov]; Nagrani, Kavita[Nagrani.Kavita@epa.gov]; Cooper, WilliamF[Cooper.WilliamF@epa.gov]; Cunningham, Caitlin[cunningham.caitlin@epa.gov]; Quigley, Heather[Quigley.Heather@epa.gov]; Mills, Clarissa[mills.clarissa@epa.gov]; Rise, David[rise.david@epa.gov]; Ordonez, Efren[Ordonez.Efren@epa.gov]; Henson, Tucker[Henson.Tucker@epa.gov]; Murdock, Russell[Murdock.Russell@epa.gov]; Campbell, Rich[Campbell.Rich@epa.gov]; Subramanian, Hema[Subramanian.Hema@epa.gov]; Ziobro, Joseph[Ziobro.Joseph@epa.gov]; Clark, Amy[Clark.Amy@epa.gov]; Juarez, Paul[Juarez.Paul@epa.gov]; Smith,

DavidW[Smith.DavidW@epa.gov]; Gholson, Greg[Gholson.Greg@epa.gov]; O'Lone, Dan[Olone.Dan@epa.gov]; Armor, Suzanne[Armor.Suzanne@epa.gov]; Spejewski, Andrew[Spejewski.Andrew@epa.gov]; Howard, MarkW[Howard.MarkW@epa.gov]; Bandrowicz, Toni[bandrowicz.toni@epa.gov]; Tinger, John[Tinger.John@epa.gov]; Grubb, Christopher[Grubb.Christopher@epa.gov]; Colletti, John[colletti.john@epa.gov]; Hamilton, Denise[Hamilton.Denise@epa.gov]; Houlihan, Damien[houlihan.damien@epa.gov]; Roberts, Connie[Roberts.Connie@epa.gov]; Jones, Kristin[jones.kristin@epa.gov]; Rosenberg, Alex[Rosenberg.Alex@epa.gov]; Hodaj, Andi[hodaj.andi@epa.gov]; Brennan, Ross[Brennan.Ross@epa.gov]; Jones, Erica[Jones.Erica@epa.gov]; Webster, David[Webster.David@epa.gov]

**From:** Molloy, Jennifer

**Sent:** Tue 11/7/2017 8:52:54 PM

**Subject:** Training: FOIA and Privacy Interests

OW Privacy Training Nov 7 2017.pptx

As discussed in an earlier call, OGC has compiled some training on FOIA Exemption 6 and the Privacy Act. This was developed in partial fulfillment of the settlement agreement reached with AFBF earlier this year. Attached is the PowerPoint and also here is the link to the recorded session, which was given earlier today to OW managers (as stipulated in the settlement agreement). If you have questions, the OGC specialists in these areas encourage you to give them a call. Their contact info is at the end of the presentation.

Here's the link to the recorded session:

[http://](#) **Ex. 5 - Attorney Client; DPP**

Jenny

Jenny Molloy

U.S. EPA

Water Permits Division

202.564.1939

[molloy.jennifer@epa.gov](mailto:molloy.jennifer@epa.gov)



# **Protecting Privacy Interests FOIA Exemption 6 & Privacy Act Training**

## **EPA Office of Water November 7, 2017**

Melissa Shapiro

OGC-GLO Information Law Practice Group

Matt Schwarz

OGC-GLO Information Law Practice Group



# Protecting Privacy Interests

## TOPICS:

**FOIA Exemptions 6 and 7(C)**

**The Privacy Act**

# FOIA Exemptions 6 & 7(C)

Two FOIA exemptions protect personal privacy – Exemptions 6 and 7(C).

Information protected by these exemptions includes information commonly referred to as Personally Identifiable Information or PII.



## FOIA Exemption 6 – 5 U.S.C. § 552(b)(6)

Protects information about individuals found in **“personnel and medical files and similar files”** when the disclosure of such information **“would constitute a clearly unwarranted invasion of personal privacy.”**



## **Exemption 7(C) – 5 U.S.C. § 552(b)(7)(C)**

**Protects “records or information compiled for law enforcement purposes,” the disclosure of which “could reasonably be expected to constitute an unwarranted invasion of personal privacy.”**



# Comparison of Exemptions 6 & 7(C)

FOIA Exemption	Information Protected	Likelihood of Privacy Invasion	Type of Privacy Invasion
6	Personnel, medical, and “similar”	<u>would</u> constitute	<u>clearly</u> unwarranted
7(C)	Law enforcement purposes	<u>could reasonably</u> constitute	unwarranted



## Exemptions 6 & 7(C)

Use the same analysis for both Exemptions 6 and 7(C)

1. Is the threshold satisfied?
2. Is a privacy interest implicated?
3. Is there a FOIA public interest in disclosure?
4. Balancing analysis of those interests.

Will depend on the nature and content of the requested records.

# Step 1. Is the threshold satisfied?



## Exemption 6 Threshold

***“Personnel and medical files and similar files”***

## Exemption 7(C) Threshold

***“Records or information compiled for law enforcement purposes”***



## **Step 2. Is a privacy interest implicated?**

## Privacy Interest

Privacy encompasses an “individual’s control of information concerning his or her person.”

Information does not need to be intimate or embarrassing to qualify for protection.

See DOJ v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 763 (1989).



# Privacy Interest

## Commonly found personally identifiable information:

- \* Name
- \* Address
- \* Phone number
- \* Date of birth
- \* Personal email addresses
- \* Financial information such as tax returns, bank account information
- \* Leave records
- \* Criminal history
- \* Medical history, health impacts, blood lead levels
- \* Social security number
- \* Familial relationships, marital status
- \* Names of potential witnesses
- \* Anonymous complainants' names, phone numbers, other contact information
- \* Conference phone numbers and access/passcodes

# Information not protected under Exemptions 6 or 7(C)

OPM regulations require disclosure of certain information related to federal employees (except those in law enforcement, DOD, National Security and other sensitive occupations) 5 C.F.R. § 293.311

- |   |   |
|---|---|
| * Name                                    | * Grades                                |
| * Position titles and occupational series | * Duty stations                         |
| * Annual salary rates                     | * Position description and job elements |
| * Performance awards and bonuses          | * Performance standards                 |



## Information not protected under Exemptions 6 or 7(C)

Corporations have no privacy interests.

**Except** small companies/sole proprietorships can take on the privacy interests of its members.

See FCC v. AT&T, Inc., 562 U.S. 397 (2011).



# Privacy Interest - Practical Obscurity

Generally, individuals have no privacy interest in information that has been previously disclosed unless the information has over time become “practically obscure.”

See DOJ v. Reporters Comm. for Freedom of the Press, 489 U.S. 749 (1989).



## 8<sup>th</sup> Circuit Court of Appeals: AFBF

“While the advent of the Internet has made some of the information at issue here more easily accessible...CAFO owners still have a privacy interest in preventing the mass aggregation and release of their personal information by the government.”

Am. Farm Bureau Fed'n v. United States EPA, 836 F.3d 963, 972(8th Cir. 2016).

## **Step 3. Is there a FOIA public interest in disclosure?**



# FOIA Public Interest

A FOIA public interest arises when disclosure of information “sheds light on an agency’s performance of its statutory duties.”

See DOJ v. Reporters Comm. for Freedom of the Press, 489 U.S. 749 (1989).

**ASK:** *What will an individual’s personal information tell me about the agency’s operations?*

## Step 4. Balance the interests



# Balance the Interests

If there is a privacy interest and a FOIA public interest in disclosure:

- \* Accord each interest a measure of value; and
- \* Balance them to determine which is greater.

# Privacy Act Overview

22



# Privacy Act of 1974

- \* **Purpose:** To regulate the collection, maintenance, use, and dissemination of personal information held by the Executive branch.
- \* Restrict disclosure of personal information.
- \* Grant a right of access to records about the requester.
- \* Grant a right to seek amendment to records that are inaccurate, irrelevant, untimely, or incomplete.
- \* Establish a code of fair information practices governing personal information.



# Central Rule: “No Disclosure without Consent”

- \* “No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains [subject to 12 exceptions].” 5 U.S.C. § 552a(b)



# “No Disclosure without Consent”

- \* **Cannot disclose a Privacy Act record unless:**
  - \* Written request from subject,
  - \* Prior written consent from subject authorizing 3<sup>rd</sup> party access, or
  - \* Any of the 12 exceptions established in statute (e.g., routine uses, agency need to know).
- \* **Privacy Act Record:** “any item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, his education, financial transactions, medical history, and criminal or employment history and that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph.”
- \* **OMB Guidelines:** Any item of information about an individual that includes an individual identifier. 40 Fed. Reg. 28,948, 28,952 (July 9, 1975).



# “System of Records”

- \* **Privacy Act System of Records:** “a group of any [Privacy Act] records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual.”
  - \* Henke v. Dep’t of Commerce, 83 F. 3d 1453: “retrieved” vs “retrievable.”
- \* **System of Records Notice (SORN)**
  - \* Required by the Privacy Act.
  - \* Publication in the Federal Register upon establishment or revision of a System of Records.
  - \* Contact Judy Earle ([earle.judy@epa.gov](mailto:earle.judy@epa.gov)) or Marlyn Aguilar ([aguilar.marlyn@epa.gov](mailto:aguilar.marlyn@epa.gov)) in the National Privacy Program (NPP) in the Office of Environmental Information (OEI) for templates (currently being updated).



# Privacy Act Statements

- \* Required when asking for personal information that will go into a system of records.
- \* Must include:
  1. Authority for Collection;
  2. Purpose;
  3. Routine Uses; and
  4. Whether the collection is voluntary or mandatory.
- \* “Mandatory”: penalties for not providing information.



# Access and Amendment Rights

- \* Access Right:
  - \* Privacy Act requests go to EPA's National Privacy Programs and are then routed to the appropriate office through a Liaison Privacy Official (LPO).
  - \* Similar to other federal agencies, EPA processes Privacy Act requests as "first-party requests" under the FOIA to maximize access.
  - \* Any Privacy Act request must include a statement from the requester (1) declaring his or her identity and (2) stipulating that he or she understands that a false statement of identity is a misdemeanor punishable by up to \$5,000. 40 C.F.R. § 16.3(c).
- \* Amendment Right: Individuals may amend (correct) their records.



# Penalties- Civil

- \* Amendment lawsuits - Injunctive relief.
- \* Access lawsuits - Injunctive relief.
- \* Accuracy lawsuits- Monetary damages for willful/intentional violations
- \* "Other provisions" lawsuits- Monetary damages for willful/intentional violations.
- \* Attorney's Fees difference:
  - \* FOIA: Fees if the lawsuit served as a "catalyst" in achieving a voluntary change in the agency's conduct.
  - \* Privacy Act: Fees are allowable only if there is a judicially-sanctioned change in relationship between parties such as a judgment on the merits or a consent decree.
    - \* Higher standard than the FOIA



# Penalties- Criminal

- \* Misdemeanor and fine up to \$5,000:
  - \* Any employee who knowing that disclosure of the specific material is so prohibited, willfully discloses the material in any manner to any person or agency not entitled to receive it. 5 U.S.C. § 552a(i)(1).
  - \* Any employee who willfully maintains a system of records without meeting the notice requirements of subsection (e)(4) (SORNs). 5 U.S.C. § 552a(i)(2).
  - \* Any person who knowingly and willfully requests or obtains any record concerning an individual from an agency under false pretenses. 5 U.S.C. § 552a(i)(3).



# Intersection of FOIA and Privacy Act

	FOIA	Privacy Act
Records	(1) created/obtained by agency and (2) under agency control	Privacy Act records in a System of Records
Access	Any person	U.S. citizens and aliens admitted for permanent residency
Searches	All appropriate records, including Systems of Records	Limited to SORs
Time Limits	20 working days by statute	20 working days by EPA regulation
Appeals	Sent to HQ FOIA, routed to OGC	Sent to National Privacy Program, routed to OGC
Fees	Statutorily-defined fee schedule	No fees for first copy of record, duplication thereafter
Processing	Proper request	Proper request + certification from requester



# PII Breaches- Examples

- \* An unauthorized disclosure of a Privacy Act record from a System of Records.
- \* A laptop containing PII is lost or stolen.
- \* PII contained in document posted to an EPA website.
- \* A manager is about to retire and places some of her files on a shared drive, but some of those files contain the PARS ratings of her subordinates.
- \* A group of employees are standing in an open area with cubicles discussing the PII of an individual seeking a job at EPA.



# EPA PII Breach Policy

- \* EPA Breach Policy: <http://intranet.epa.gov/oei/imitpolicy/qic/ciopolicy/CIO-2151-P-02.2.pdf>
- \* **You *must* report any suspected or confirmed breach by calling the EPA Call Center: 1-866-411-4EPA (4372).**
- \* Personally Identifiable Information (PII): Defined by OMB as “Information that can be used to distinguish or trace an individual's identity, such as their name, SSN, biometric records (e.g., fingerprints), etc. alone, or when combined with other personal or identifying information that is linked or linkable to a specific individual, such as date and place of birth, mother's maiden name, etc.”
- \* Sensitive Personally Identifiable Information (SPII): defined in EPA’s Information Security Privacy Procedures as “a subset of PII, which if lost, compromised, or disclosed without authorization, could result in substantial harm, embarrassment, inconvenience, or unfairness to an individual. The EPA defines SPII as social security numbers or comparable identification numbers, financial information associated with individuals, and medical information associated with individuals. SPII requires additional levels of security controls.”
  - \* Requires additional controls such as encryption.



# Privacy Act Resources

- \* The Privacy Act of 1974
  - \* <https://www.gpo.gov/fdsys/pkg/USCODE-2013-title5/html/USCODE-2013-title5-partI-chap5-subchapII-sec552.htm>
- \* DOJ Overview of the Privacy Act of 1974 (2015 Edition)
  - \* <https://www.justice.gov/opcl/overview-privacy-act-1974-2015-edition>
- \* EPA National Privacy Program: Policies, Procedures, and Guidance
  - \* [http://intranet.epa.gov/privacy/docs\\_guidance.html](http://intranet.epa.gov/privacy/docs_guidance.html)
- \* EPA Privacy Act Regulations at 40 C.F.R. Part 16
  - \* <https://www.gpo.gov/fdsys/pkg/FR-2006-01-04/pdf/06-45.pdf>

# Privacy Contacts

- \* Matt Schwarz  
OGC-GLO, Information Law Practice Group  
Schwarz.matthew@epa.gov
- \* Melissa Shapiro,  
OGC-GLO, Information Law Practice Group  
Shapiro.melissa@epa.gov
- \* Judy Earle  
Agency Privacy Officer  
Earle.judy@epa.gov

**From:** Edwards, Crystal

**Location:** Adobe Connect; Conference Line

**Importance:** Normal

**Subject:** Mandatory Privacy Training (FOIA Exemption 6 and Privacy Act) for OW Managers

**Start Date/Time:** Tue 11/7/2017 5:00:00 PM

**End Date/Time:** Tue 11/7/2017 6:00:00 PM

## **Ex. 6 - Personal Privacy**

Per a settlement agreement with American Farm Bureau Federation and National Pork Producer Council, managers in the Office of Water are required to participate in a one-hour training session on privacy, specifically Exemption 6 of the Freedom of Information Act and the Privacy Act. This webinar session will be conducted via Adobe Connect and will be recorded for those who cannot make this session. All OW managers must complete the training during this time or via the recorded session no later than **December 22, 2017**.

**Adobe Connect Link:** <http://epawebconferencing.acms.com/privacy/>

POCs: Jenny Molloy, OWM

Quoc Nguyen, OGC



**To:** Nagle, Deborah[Nagle.Deborah@epa.gov]; Ferris, Lena[Ferris.Lena@epa.gov]  
**Cc:** Brennan, Ross[Brennan.Ross@epa.gov]; Molloy, Jennifer[molloy.jennifer@epa.gov]; Levine, MaryEllen[levine.maryellen@epa.gov]; Utting, George[Utting.George@epa.gov]; Rathbone, Colleen[Rathbone.Colleen@epa.gov]; Kupchan, Simma[Kupchan.Simma@epa.gov]  
**From:** Nguyen, Quoc  
**Sent:** Thur 4/20/2017 3:25:54 PM  
**Subject:** RE: question regarding permit information for CAFOs allowable for release in response to FOIA request  
[FINAL Instructions for Handling CAFO Information Related to AFBF 3-30-17.pdf](#)

Hi Lena,

Could you send the attached instructions out prior to Monday's call?

Thanks,

Quoc

Quoc P. Nguyen

Office of General Counsel

U.S. Environmental Protection Agency

1200 Pennsylvania Avenue, NW

Washington, DC 20460

202-564-6343

PRIVILEGED COMMUNICATION for internal deliberation only; may contain deliberative, attorney-client, attorney work product, or otherwise privileged material; do not distribute outside EPA or DOJ.

**From:** Nagle, Deborah

**Sent:** Wednesday, April 19, 2017 9:38 AM

**To:** Ferris, Lena <Ferris.Lena@epa.gov>

**Cc:** Brennan, Ross <Brennan.Ross@epa.gov>; Molloy, Jennifer <molloy.jennifer@epa.gov>; Levine, MaryEllen <levine.maryellen@epa.gov>; Nguyen, Quoc <Nguyen.Quoc@epa.gov>; Utting, George <Utting.George@epa.gov>; Rathbone, Colleen <Rathbone.Colleen@epa.gov>; Kupchan, Simma <Kupchan.Simma@epa.gov>

**Subject:** RE: question regarding permit information for CAFOs allowable for release in response to FOIA request

Lena-

Do you have a call with just the Regional Ag Advisors. If so, I would like to propose that I have someone from my team (probably OGC) provide information on the substance of the settlement agreement in this case – explaining what it means and what it does not mean.

Let me know. Thanks

Deborah

Deborah G. Nagle, Director  
Water Permits Division  
MC 4203M  
1200 Pennsylvania Ave, NW  
Washington, DC 20460  
Tel: (202) 564-1185  
FAX: (202) 564-6392

**From:** Utting, George  
**Sent:** Wednesday, April 19, 2017 9:25 AM  
**To:** Rathbone, Colleen <[Rathbone.Colleen@epa.gov](mailto:Rathbone.Colleen@epa.gov)>; Kupchan, Simma <[Kupchan.Simma@epa.gov](mailto:Kupchan.Simma@epa.gov)>  
**Cc:** Nagle, Deborah <[Nagle.Deborah@epa.gov](mailto:Nagle.Deborah@epa.gov)>; Brennan, Ross <[Brennan.Ross@epa.gov](mailto:Brennan.Ross@epa.gov)>; Molloy, Jennifer <[molloy.jennifer@epa.gov](mailto:molloy.jennifer@epa.gov)>  
**Subject:** RE: question regarding permit information for CAFOs allowable for release in response to FOIA request

Thanks, Colleen. I think this needs an OGC response. I am cc'ing Jenny Molloy, who is working on these issues here, and Ross Brennan and Deborah Nagle.

George Utting  
Water Permits Division (MC-4203M)  
U.S. EPA, 1200 Pennsylvania Avenue, NW,  
Washington, DC 20460-0001  
(202) 564-0744 / Fax (202) 564-6384

**From:** Rathbone, Colleen  
**Sent:** Wednesday, April 19, 2017 9:19 AM  
**To:** Kupchan, Simma <[Kupchan.Simma@epa.gov](mailto:Kupchan.Simma@epa.gov)>; Utting, George <[Utting.George@epa.gov](mailto:Utting.George@epa.gov)>  
**Subject:** question regarding permit information for CAFOs allowable for release in response to FOIA request

All,

See the email below from Region 8's acting ag advisor. I think that the description of what the settlement agreement pertains to and what was agreed to probably needs some clarification. Thanks for your help.

Colleen Rathbone | Unit Manager, Wastewater | U.S. Environmental Protection Agency - Region 8

(p) 303.312.6133 | (f) 303.312.6116

**From:** OBrien, Wendy

**Sent:** Wednesday, April 19, 2017 6:45 AM

**To:** Rathbone, Colleen <[Rathbone.Colleen@epa.gov](mailto:Rathbone.Colleen@epa.gov)>

**Subject:** RE: question regarding permit information allowable for release in response to FOIA request

Thank you!

Wendy O'Brien, DVM, PhD, DABT

Acting Agriculture Advisor

Office of the Regional Administrator

USEPA Region 8

1595 Wynkoop Street

Denver, CO 80202

Phone: 303.312.6712

FAX: 303.312.6882

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**From:** Rathbone, Colleen  
**Sent:** Wednesday, April 19, 2017 6:43 AM  
**To:** OBrien, Wendy <OBrien.Wendy@epa.gov>; Clark, Amy <Clark.Amy@epa.gov>; Boeglin, Michael <Boeglin.Michael@epa.gov>  
**Subject:** RE: question regarding permit information allowable for release in response to FOIA request

I called Water Permits Division and am waiting to hear back. I do not know the details.

Colleen Rathbone | Unit Manager, Wastewater | U.S. Environmental Protection Agency - Region 8

(p) 303.312.6133 | (f) 303.312.6116

**From:** OBrien, Wendy  
**Sent:** Tuesday, April 18, 2017 3:31 PM  
**To:** Rathbone, Colleen <Rathbone.Colleen@epa.gov>; Clark, Amy <Clark.Amy@epa.gov>; Boeglin, Michael <Boeglin.Michael@epa.gov>  
**Subject:** question regarding permit information allowable for release in response to FOIA request

Hi All,

## Ex. 5 - Deliberative Process

**Ex. 5 - Deliberative Process** I committed to clarifying the status of the situation and getting back to my point of contact in UDAF, Jay Olsen, and also Don Hall.

## Ex. 5 - Deliberative Process

**Ex. 5 - Deliberative Process** My understanding is that the American Farm Bureau Federation and the National

Pork Producers Council sued EPA, and that an agreement was recently reached between the American Farm Bureau Federation and the National Pork Producers Council and EPA. The agreement is that EPA may release only the following information in response to FOIA requests: city, county, ZIP code, and permit status.

I'm following up with you either because you were mentioned on the call as a point of contact here in the R8 office, or because I found your name listed on EPA's Region 8 website for CAFO or NPDES permits.

If you can please confirm that the information above is correct, or provide clarification, I'd be most appreciative!

Thanks so much.

Wendy

Wendy O'Brien, DVM, PhD, DABT

Acting Agriculture Advisor

Office of the Regional Administrator

USEPA Region 8

1595 Wynkoop Street

Denver, CO 80202

Phone: 303.312.6712

FAX: 303.312.6882



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**To:** Burdett, Cheryl[burdett.cheryl@epa.gov]; Coats, Andrea[Coats.Andrea@epa.gov]; Colletti, John[colletti.john@epa.gov]; Cooper, WilliamF[Cooper.WilliamF@epa.gov]; Hamilton, Denise[Hamilton.Denise@epa.gov]; Houlihan, Damien[houlihan.damien@epa.gov]; Jones, Erica[Jones.Erica@epa.gov]; Mitschele, Becky[Mitschele.Becky@epa.gov]; Peak, Nicholas[Peak.Nicholas@epa.gov]; Porter, Donna[Porter.Donna@epa.gov]; Rise, David[rise.david@epa.gov]; Socha, Julianne[socha.julianne@epa.gov]; Webster, David[Webster.David@epa.gov]; Zolandz, Mark[Zolandz.Mark@epa.gov]; Utting, George[Utting.George@epa.gov]; Bonnelycke, Nina[Bonnelycke.Nina@epa.gov]; Ziobro, Joseph[Ziobro.Joseph@epa.gov]; Subramanian, Hema[Subramanian.Hema@epa.gov]; Brennan, Ross[Brennan.Ross@epa.gov]

**From:** Molloy, Jennifer

**Sent:** Tue 4/25/2017 8:34:03 PM

**Subject:** CAFO-related FOIAs

[FINAL Instructions for Handling CAFO Information Related to AFBF 3-30-17.pdf](#)

As most of you know EPA recently settled the FOIA-related litigation: AFBF vs EPA. I'm attaching the instructions for responding to FOIA requests for the information specific to the 2 requests that were litigated. This is largely FYI since FOIAs requesting that specific information should be directed to HQ.

However, I did want to pass along from OGC that should you receive other CAFO-related FOIA requests that could potentially involve data pulls or anything else for which you would like some assistance with the analysis, please give us a call and we will help you sort through it.

Jenny Molloy

U.S. EPA

Water Permits Division

202.564.1939

molloy.jennifer@epa.gov

**To:** OW-OWM-PD[OWOWMPD@epa.gov]  
**Cc:** Sawyers, Andrew[Sawyers.Andrew@epa.gov]; Frace, Sheila[Frace.Sheila@epa.gov]; Gilbertson, Sue[gilbertson.sue@epa.gov]; Farris, Erika D.[Farris.Erika@epa.gov]; Souders, Alison[Souders.Alison@epa.gov]; Sylvester, Francis[Sylvester.Francis@epa.gov]  
**From:** Jones-Coleman, Diane  
**Sent:** Fri 3/31/2017 5:53:50 PM  
**Subject:** FOIA Instructions for AFBF v. EPA (CAFO Litigation Settlement Agreement)  
FINAL Instructions for Handling CAFO Information Related to AFBF 3-30-17.pdf

Good afternoon everyone,

The HQ FOIA Officer has provided the FOIA community with instructions for responding to future FOIA requests that seek concentrated animal feeding operation information (CAFO), at issue in the recently settled AFBF v. EPA FOIA litigation. See attachment.

If you have questions regarding these instructions, please contact Quoc Nguyen, General Law Office, at 202-564-6343 or Larry Gottesman, HQ FOIA Officer, at 202-566-2162.

Thank you.

**Diane**

Diane C. Coleman

OW FOIA Coordinator and SPOC  
(202) 564-0379  
E-mail: Jones-Coleman.Diane@epa.gov

**To:** Utting, George[Utting.George@epa.gov]; Molloy, Jennifer[molloy.jennifer@epa.gov];  
Bonnelycke, Nina[Bonnelycke.Nina@epa.gov]  
**From:** Brennan, Ross  
**Sent:** Tue 5/2/2017 4:57:23 PM  
**Subject:** FW: FOIA Instructions for AFBF v. EPA (CAFO Litigation Settlement Agreement)  
FINAL Instructions for Handling CAFO Information Related to AFBF 3-30-17.pdf

---

Ross Brennan

Acting Chief, Rural Branch

EPA Office of Wastewater Management

(202) 564-3248

**From:** Magruder, DeMara  
**Sent:** Tuesday, May 02, 2017 9:41 AM  
**To:** Brennan, Ross <Brennan.Ross@epa.gov>  
**Subject:** FW: FOIA Instructions for AFBF v. EPA (CAFO Litigation Settlement Agreement)  
**Importance:** High

**From:** Jones-Coleman, Diane  
**Sent:** Friday, March 31, 2017 1:54 PM  
**To:** OW-OWM-PD <OWOWMPD@epa.gov>  
**Cc:** Sawyers, Andrew <Sawyers.Andrew@epa.gov>; Frace, Sheila <Frace.Sheila@epa.gov>;  
Gilbertson, Sue <gilbertson.sue@epa.gov>; Farris, Erika D. <Farris.Erika@epa.gov>; Souders,  
Alison <Souders.Alison@epa.gov>; Sylvester, Francis <Sylvester.Francis@epa.gov>  
**Subject:** FOIA Instructions for AFBF v. EPA (CAFO Litigation Settlement Agreement)  
**Importance:** High



Good afternoon everyone,

The HQ FOIA Officer has provided the FOIA community with instructions for responding to future FOIA requests that seek concentrated animal feeding operation information (CAFO), at issue in the recently settled AFBF v. EPA FOIA litigation. See attachment.

If you have questions regarding these instructions, please contact Quoc Nguyen, General Law Office, at 202-564-6343 or Larry Gottesman, HQ FOIA Officer, at 202-566-2162.

Thank you.

**Diane**

Diane C. Coleman

OW FOIA Coordinator and SPOC

(202) 564-0379

E-mail: [Jones-Coleman.Diane@epa.gov](mailto:Jones-Coleman.Diane@epa.gov)

**Instructions for Handling Concentrated Animal Feeding Operations Information Related to AFBF v. EPA, No. 13-1751 (D. Minn.)  
March 30, 2017**

The Agency recently settled a reverse-Freedom of Information Act (FOIA) case involving certain information related to concentrated animal feeding operations and facilities (CAFOs) for 36 states. Specifically, on March 24, 2017, the U.S. District Court in the District of Minnesota entered a Stipulation of Settlement and Dismissal (Settlement Agreement) in AFBF v. EPA, No. 13-1751 (D. Minn.). See Appendix A, Settlement Agreement.

**The Settlement Agreement requires your attention in the event future FOIA requests seek the information at issue in the settled case.**

Pursuant to the Settlement Agreement, EPA agreed to provide written instructions to Headquarters FOIA Coordinators and Regional FOIA Officers. The instructions below address how the Agency should respond to future FOIA requests for the information at issue in the settled case.

**INSTRUCTIONS**

***Information addressed by this instruction:*** The information at issue in the settled case was the set of 73 documents or spreadsheets responsive to two FOIA requests submitted by Earthjustice (EPA-HQ-2012-001337) and the Natural Resources Defense Council and the Pew Charitable Trusts (EPA-HQ-2013-001516). See Appendix B, the two FOIA requests. The Office of Water's Office of Wastewater Management collected this information about CAFOs from twenty-seven state permitting authorities, eight state websites, EPA databases, and EPA regional offices. The Office of Wastewater Management responded to the two FOIA requests (EPA-HQ-2012-001337 and EPA-HQ-2013-001516) and produced redacted information from the 73 documents or spreadsheets through FOIAonline. The following links will direct you to the Agency's final response to these two requests:

- 1) EPA-HQ-2012-001337:  
<https://foiaonline.regulations.gov/foia/action/public/view/request?objectId=090004d28000843a>
- 2) EPA-HQ-2013-001516:  
<https://foiaonline.regulations.gov/foia/action/public/view/request?objectId=090004d28001613d>

Provided below are examples of FOIA requests the Agency has received that specifically sought the 73 documents or spreadsheets at issue in the settled case.

*Language from FOIA requests seeking the 73 documents or spreadsheets:*

- "Freedom of Information Act request for information related to the withdrawal of the CAFO Reporting Rule, from Eve C. Gartner, Esq, Earthjustice, dated September 11, 2012."

- “Freedom of Information Act request for disclosure of records [related to the withdrawal of the CAFO Reporting Rule]...from Claire Althouse [or Jon Devine], Natural Resources Defense Council, dated October 24, 2012.”
- “All records responsive to FOIA requests 2012-1337 and 2013-1516.”
- “[A]ny records...to the proposed NPDES CAFO Reporting Rule (76 Fed. Reg. 65,431 (Oct. 21, 2011)).”

***Instructions for handling CAFO FOIA requests seeking the 73 documents or spreadsheets at issue in the settled case:*** If EPA receives a FOIA request seeking the 73 documents or spreadsheets or to which the 73 documents or spreadsheets, as described above (*see* “Information addressed by this instruction”), are responsive, you are to respond by referring the requester(s) to FOIAonline and referencing the response provided to EPA-HQ-2012-001337 and EPA-HQ-2013-001516. Please refer to the public URL links above.

If you have any questions, please contact Jenny Molloy, Office of Water, at 202-564-1939 or Quoc Nguyen, Office of General Counsel, at 202-564-6342.

**APPENDIX A: Settlement Agreement**

UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA  
Civil No. 13-1751 (ADM/TNL)

AMERICAN FARM BUREAU  
FEDERATION, and NATIONAL PORK  
PRODUCERS COUNCIL

Plaintiffs,

v.

U.S. ENVIRONMENTAL PROTECTION  
AGENCY, and GINA McCARTHY,<sup>1</sup>  
Administrator U.S. Environmental Protection  
Agency,

Defendants,

and

FOOD & WATER WATCH,  
ENVIRONMENTAL INTEGRITY  
PROJECT, AND IOWA CITIZENS FOR  
COMMUNITY IMPROVEMENT,

Intervenors.

**STIPULATION OF SETTLEMENT  
AND DISMISSAL**

WHEREAS, on July 5, 2013, Plaintiffs, the American Farm Bureau Federation (“AFBF”) and National Pork Producers Council (“NPPC”) (together, “Plaintiffs”), filed their Complaint for Declaratory and Injunctive Relief (“Complaint”), alleging a claim under the Administrative Procedure Act and seeking an Order enjoining the U.S.

---

<sup>1</sup> Scott Pruitt is now the Administrator of EPA. Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, Mr. Pruitt should be substituted for Gina McCarthy as defendant in this suit.



Environmental Protection Agency (“EPA”) from disclosing certain information (referred to herein as the “disputed information”) in response to Freedom of Information Act (“FOIA”) requests submitted by Earthjustice (EPA-HQ-2012-001337) and the Natural Resources Defense Council and the Pew Charitable Trusts (EPA-HQ-2013-001516).

WHEREAS, the disputed information consists of a set of 73 documents (“disputed information”) that EPA collected from twenty-seven state permitting authorities, eight state websites, EPA databases, and EPA regional offices, following the Agency’s determination to compile reliable information about concentrated animal feeding operations (“CAFOs”) in the United States using existing data sources rather than promulgating a rule requiring CAFOs to submit information directly to EPA.

WHEREAS, in this lawsuit, Plaintiffs allege that portions of the disputed information are protected by Exemption 6 of the FOIA, which pertains to “[p]ersonnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” 5 U.S.C. § 552(b)(6).

WHEREAS, the disputed information consists of data pertaining to animal feeding operations, which is aggregated by state, for the following states: Alabama, Arizona, Arkansas, California, Colorado, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Louisiana, Maine, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Jersey, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Dakota, Tennessee, Texas, Utah, Washington, Wisconsin, and Wyoming.

WHEREAS, the disputed information was filed in the administrative record in this matter, at ECF. No. 69, Exhibits 16 and 32.

WHEREAS, Plaintiffs, AFBF and NPPC, and Defendants, Administrator Scott Pruitt and EPA, wish to avoid any further litigation and controversy and to settle and

compromise fully any and all claims and issues that have been raised, or could have been raised in this action, which have transpired prior to the execution of this Stipulation of Settlement and Dismissal ("Stipulation").

Now, therefore, the parties, by and through their respective counsel, hereby settle and compromise the above-captioned lawsuit. The parties stipulate that this matter is hereby settled and compromised on the following terms:

1. Defendants agree that only the columns reflecting permit status, city, county, and 5-digit zip code in the disputed information, which, as defined above, consists of 73 documents set forth at ECF No. 69, Exhibits 16 and 32, will be released in response to the FOIA requests at issue in this case, EPA-HQ-2012-001337 and EPA-HQ-2013-001516. All other columns and fields in the disputed information will be redacted pursuant to 5 U.S.C. § 552(b)(6).

2. Defendants have provided, and Plaintiffs have reviewed, the disputed information with the agreed-upon redactions, and those redactions are attached hereto as Exhibit A.

3. Defendants also agree to release the same redacted disputed information, as set forth in Exhibit A, in response to the following pending FOIA requests submitted to EPA Headquarters that seek the disputed information: (1) EPA-HQ-2013-006737; (2) EPA-HQ-2013-006604; (3) EPA-HQ-2013-004128; (4) EPA-HQ-2013-008906; (5) EPA-HQ-2013-007430; (6) EPA-HQ-2013-006913; (7) EPA-HQ-2013-004097; (8) EPA-HQ-2015-004064; (9) EPA-HQ-2015-006732; and (10) EPA-HQ-2016-008563. Defendants further agree to post the redacted disputed information, responsive to the

FOIA requests identified in Paragraphs 1 and 3, to FOIAonline ([www.FOIAonline.regulations.gov](http://www.FOIAonline.regulations.gov)), consistent with 5 U.S.C. § 552(a)(2)(D).

4. Within 7 calendar days of the execution of this Stipulation, Defendants will provide the redacted disputed information, set forth at Exhibit A, in response to the FOIA requests identified in Paragraphs 1 and 3 above.

5. Within 7 calendar days of the execution of this Stipulation, Defendants will request in writing that the FOIA requesters in EPA-HQ-2012-001337 and EPA-HQ-2013-001516 return to EPA or destroy all copies of any previous responses to those FOIA requests and cease any further or ongoing dissemination of the same.

6. This Stipulation does not bind Defendants with respect to its response to any FOIA request other than the FOIA requests identified in Paragraphs 1 and 3 of this Stipulation. Within 7 calendar days of execution of this Stipulation, Defendants agree to provide written instruction to EPA's Regional and Headquarters FOIA coordinators that if they receive a FOIA request seeking the disputed information, as defined above, they are to respond by referring the requester(s) to FOIAonline and referencing the response provided to EPA-HQ-2012-001337 and EPA-HQ-2013-001516. This instruction will also be included in the training described below in paragraph 7.

7. Defendants agree to conduct training for managers in EPA's Office of Water and Regional and Headquarters FOIA coordinators regarding the Agency's obligations under the FOIA and the Privacy Act. Among other things, the training will focus on Exemption 6 of the FOIA, the Privacy Act, and other relevant privacy issues. The training will be conducted in the 2017 calendar year.

8. Plaintiffs agree to dismiss this lawsuit with prejudice. Such dismissal shall be effected via the stipulation of voluntary dismissal with prejudice per Fed. R. Civ. P. 41(a)(1)(A)(ii) that is attached hereto as Exhibit B. The parties shall file with the Court such stipulation of dismissal within ten business days of execution of this Stipulation.

9. This Stipulation constitutes the full and complete satisfaction of any and all claims on behalf of Plaintiffs arising from (a) the allegations set forth in the complaint filed in this lawsuit and (b) any litigation or administrative proceeding that Plaintiffs have brought, could bring, or could have brought against Defendants regarding the specific FOIA requests identified in Paragraphs 1 and 3 of this Stipulation, including all claims for attorneys' fees and costs. Any and all remaining claims and issues in this litigation are released and waived by all parties.

10. This Stipulation does not constitute an admission of liability or fault on the part of Defendants, the EPA, or its agents, servants, or employees, and this Stipulation shall not be construed as an admission of liability or fault. This Stipulation is entered into by both parties for the sole purpose of compromising disputed claims and avoiding the expenses and risks of further litigation. This Stipulation will not be used in any manner to establish liability for fees, amounts, or hourly rates, in any other case or proceeding.

11. This Stipulation is binding upon and inures to the benefit of the parties hereto and their respective successors and assigns.

12. Each party will bear its own attorney's fees and costs.



13. The undersigned attorneys are authorized to enter into this Stipulation of Settlement on behalf of their respective clients.

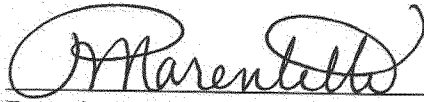
14. This Stipulation may be executed in counterparts as if executed by both parties on the same document.

[Signatures next page]

U.S. ENVIRONMENTAL PROTECTION AGENCY &  
E. SCOTT PRUITT, ADMINISTRATOR

GREGORY G. BROOKER  
Acting United States Attorney  
District of Minnesota

BY:



Pamela A. Marentette  
Assistant United States Attorney

DATE: March 23, 2017

AMERICAN FARM BUREAU FEDERATION

BY:

Ellen Steen,  
General Counsel & Secretary

DATE: \_\_\_\_\_

NATIONAL PORK PRODUCERS COUNCIL

BY:

Michael Formica,  
Assistant Vice President & Counsel, Domestic Policy

DATE: \_\_\_\_\_



**EARTHJUSTICE**

ALASKA CALIFORNIA FLORIDA MID-PACIFIC NORTHEAST NORTHERN ROCKIES  
NORTHWEST ROCKY MOUNTAIN WASHINGTON, DC INTERNATIONAL

**RECEIVED**  
SEP 12 2012

September 11, 2012

By Email: [hq.foia@epa.gov](mailto:hq.foia@epa.gov)

National Freedom of Information Officer  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue, NW (2822T)  
Washington, DC 20460  
(202) 566-1667 FAX (202) 566-2147  
E-mail: [hq.foia@epa.gov](mailto:hq.foia@epa.gov)

Re: Freedom of Information Request for information related to the withdrawal of the  
CAFO Reporting Rule

Dear Freedom of Information Officer:

Earthjustice submits this request for records in accordance with the provisions of the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. In accordance with FOIA, please provide us with the following records relating to the rule proposed by the Environmental Protection Agency ("EPA") on October 21, 2011, under section 308 of the Clean Water Act, to collect information about concentrated animal feeding operations (CAFOs) (the "CAFO Reporting Rule"), and the withdrawal of the CAFO Reporting Rule announced by EPA on July 20, 2012:

1. All records, including all communications, shared or otherwise maintained between EPA and any other governmental agency (including, but not limited to, the United States Department of Agriculture and/or the United States Geological Survey) relating to the CAFO Reporting Rule and/or the 2012 withdrawal of the CAFO Reporting Rule ;
2. All records reflecting any communication, written or verbal, between the EPA and any private party, corporation or non-profit organization (including, but not limited to, the National Pork Producers Council, the American Farm Bureau Federation, the National Chicken Council, the U.S. Poultry & Egg Association, and the National Milk Producer's Federation) relating to the CAFO Reporting Rule and/or the 2012 withdrawal of the CAFO Reporting Rule;
3. All records created or updated since November 28, 2008, relating to EPA's evaluation of information publicly available about CAFOs in the United States.
4. All records, including, but not limited to, all communications and records identifying, discussing, mentioning, describing, reporting or analyzing, the July 2012 memorandum of understanding (MOU) entitled "Collaborative Efforts to Collect and

156 WILLIAM STREET SUITE 800 NEW YORK, NY 10038  
T: 212.791.1881 F: 212.918.1556 E: [neoffice@earthjustice.org](mailto:neoffice@earthjustice.org) W: [www.earthjustice.org](http://www.earthjustice.org)

Exchange Information about Concentrated Animal Feeding Operations" entered into between EPA and the Association of Clean Water Administrators;

5. All records relating to how EPA will obtain information about CAFOs in states for which current site-specific information about CAFOs is not available on the internet, including, at a minimum, CAFOs in Maine, Massachusetts, New Hampshire, Rhode Island, Vermont, Puerto Rico, U.S. Virgin Islands, West Virginia, Georgia, Illinois, Minnesota, Kansas, Nevada, Alaska, Idaho, and Washington;
6. All records relating to and/or identifying existing sources of information about CAFOs, including the AFOs themselves, and EPA's proposed and intended data collection process for gathering that information.

The use of the word "record" above includes, but is not limited to, documents in all forms (including electronic), information, emails, faxes, letters, comments, reports, summaries of telephone conversations, handwritten notes, meeting minutes, or any other materials. **EPA need not produce documents that are part of the docket for the CAFO Reporting Rule (Docket EPA-HQ-QW-2011-0188) as posted on Regulations.gov.**

The use of the word "unredacted" above means that we are seeking full disclosure of all information in the requested record. In the event that you determine that you can disclose only some of the information contained in a record that falls within the scope of this request, please provide us with a copy of the record with only the information that you have determined to be properly treated as confidential redacted.

If any information requested herein was, but is no longer, in EPA's possession or subject to its control, state whether it is (a) missing or lost, (b) has been destroyed, (c) has been transferred voluntarily or involuntarily to others, or (d) otherwise disposed of, and in each instance, explain the circumstances surrounding and authorization for such disposition of it and state the date or approximate date of it.

If you claim that any of the foregoing information is exempt from mandatory disclosure, we respectfully request that you:

- (1) Provide an index of all documents containing the requested information, reflecting the date, author, addressee, number of pages, and subject matter of such documents;
- (2) State the exemption you deem to be applicable to each information request;
- (3) State with particularity the reason why such exemption is applicable to each information request;
- (4) Examine each information request to determine if reasonably segregable non-exempt information exists which may be released after redacting information deemed to be exempt; and
- (5) Exercise your discretion to release such records notwithstanding the availability of a basis for withholding.

#### **FEE WAIVER REQUEST**

Pursuant to 5 U.S.C. § 552(a)(4)(A)(iii), we request a fee waiver because "disclosure of the requested information is in the public interest because it is likely to contribute significantly to



public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” *Id.* As demonstrated below, each of the four factors related to the first fee waiver requirement, as specified in EPA’s FOIA regulations at 40 C.F.R. § 2.107(l)(2)(i)-(iv), weigh in favor of granting our fee waiver request.

***Factor 1: The Requested Records Concern the Operations or Activities of the Federal Government.***

The subject matter of the requested records concerns “identifiable operations or activities of the Federal government,” 40 C.F.R. § 2.107(l)(2)(i), insofar as the requests relate to EPA’s proposal to promulgate the CAFO Reporting Rule and its subsequent decision to withdraw is proposal to promulgate such a rule.

***Factor 2: Disclosure of the Requested Records is Likely to Contribute to Public Understanding of Government Operations or Activities.***

Disclosure of the requested records is “likely to contribute” to an “increased public understanding,” 40 C.F.R. § 2.107(l)(2)(ii), of government operations or activities because such disclosure will enable the requester to understand why EPA decided to withdraw the CAFO Reporting Rule, and how EPA expects to be able to develop facility-specific information about all the CAFOs in the United States, including facility location and basic operational characteristics that relate to how and why a facility may discharge, without requiring CAFOs to report this information to EPA. This information is not already accessible through EPA’s website. *See* Factor 4, below.

***Factor 3: Disclosure of the Requested Records Will Contribute to the Understanding of a Broad Audience of Persons Interested in How the Government Decided Not to Require CAFOs to Report and in How the Government Will Identify CAFOs that Are Discharging, But Are Not in the NPDES Program***

Disclosure will “contribute to the understanding of a reasonably broad audience of persons interested in” learning about the Government’s efforts to regulate CAFOs under the Clean Water Act, and how EPA can comply with its mandates under the Clean Water Act without gathering the information it would have received under the CAFO Reporting Rule. This is because Earthjustice, the requesting organization, is a national nonprofit environmental law firm which has made safeguarding the environment, including especially the nation’s waters, one of its top priorities and has developed expertise in this area. In order to further its work to protect the nation’s waters, Earthjustice has brought numerous lawsuits seeking to enforce the Clean Water Act, and filed several Clean Water Act petitions with EPA. *See, e.g., Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*, 557 U.S. 261 (2009) (counsel of record for respondents Southeast Alaska Conservation Council, et al. in case involving the discharge of wastewater into Lower Slate Lake); *Friends of Everglades v. South Florida Water Management Dist.*, 570 F.3d 1210 (11th Cir. 2009) (representing plaintiffs in case involving pumping of polluted water into Lake Okeechobee); *Petition under the Clean Water Act to Establish Toxicity Criteria and Require Toxicity Testing and Public Disclosure of Ingredients for Products on the National Contingency Plan Product Schedule* (Oct. 13, 2010),

[http://earthjustice.org/sites/default/files/files/dispersant\\_petition\\_0.pdf](http://earthjustice.org/sites/default/files/files/dispersant_petition_0.pdf). In addition, Earthjustice has filed or intervened in several lawsuits involving pollution emanating from CAFOs. *See, e.g., Waterkeeper Alliance v. EPA*, No. 09-1017 (D.C. Cir. Jan. 15, 2009) (representing petitioners in challenge to regulations exempting from reporting air releases of hazardous substances from animal waste at farms); *Rose Acre Farms, Inc. v. NC Department of Environment and Natural Resources*, No. 12-CVS-10 (Super. Ct. Hyde Cty March 2, 2012) (representing intervenors on side of State agency defending decision to require egg CAFO to operate under NPDES permit). Because of our expertise in this area, Earthjustice is well-prepared to analyze and evaluate the records we receive pursuant to this request and assess them in the context of the statutory mandates of the Clean Water Act and the information already available to EPA about CAFOs, and determine whether EPA's can fulfill its Clean Water Act obligations with respect to CAFOs in light of the decision to withdraw the CAFO Reporting Rule.

In addition to being able to analyze the information provided to determine whether EPA's actions can be reconciled with its obligations under the Clean Water Act, Earthjustice has the "ability and intention to convey this information to the public." 40 C.F.R. § 2.107(l)(2)(iii). Earthjustice can publicize information received from this request – and its analysis of whether the withdrawal of the CAFO Reporting Rule is consistent with the EPA's Clean Water Act's mandates -- in its monthly electronic newsletter, which serves approximately 223,000 subscribers. Earthjustice also can utilize its online action alert system to urge members of the public to contact policymakers and ask them to take action based on information received from this request; typically, 15,000 to 20,000 individuals respond to such alerts. Finally, Earthjustice's full-time health campaigner can disseminate newsworthy information obtained from this request to the media, and Earthjustice's full-time health lobbyist can provide relevant information obtained from this request to elected officials in Washington..

***Factor 4: The Contribution to Public Understanding of Government Operations or Activities Will Be Significant.***

The public's understanding of government operations or activities related to EPA's knowledge of pollution caused by CAFOs and whether EPA has an adequate plan for determining which CAFOs are discharging pollutants into waters of the United States, "as compared to the level of public understanding existing prior to disclosure, [will] be enhanced by the disclosure to a significant extent." 40 C.F.R. § 2.107(l)(2)(iv). Because so little is publicly known or understood about EPA's plan for learning about, and addressing, discharges from CAFOs in the absence of the CAFO Reporting Rule, public understanding of these efforts will undoubtedly be enhanced to a significant extent by disclosures in response to this request.

In addition, the second fee waiver requirement – that the request "is not primarily in the commercial interest of the requester," 40 C.F.R. § 2.107(l)(1) – is also met here. The requester, Earthjustice, is a 501(c)(3) nonprofit organization and does not have any "commercial interest that would be furthered by the requested disclosure" of information.<sup>1</sup> 40 C.F.R. § 2.107(l)(3)(i).

<sup>1</sup> Indeed, the legislative history of the fee waiver provision reveals that it was added to FOIA "in an attempt to prevent government agencies from using high fees to discourage certain types of requesters, and requests," in particular those from journalists, scholars and nonprofit public interest groups. *See Ettlinger v. FBI*, 596 F. Supp. 867, 872 (D. Mass. 1984).

Indeed, Requester's sole interest in obtaining the requested information is to broaden public understanding of why EPA withdrew the CAFO Reporting Rule, and whether EPA has a reasonable plan in place to learn about which CAFOs are likely discharging, and to undertake advocacy efforts related to improving EPA's regulation of CAFOs under the Clean Water Act, if appropriate.

In sum, this request meets the requirements for a fee waiver. In the event that fees are not waived, please notify and inform us of the basis for your decision.

#### INSTRUCTIONS FOR RECORD DELIVERY

To the extent that the requested records are available in a readily accessible electronic format, we would prefer to receive the documents electronically, either by email or on a CD. If electronic copies are unavailable, we will accept paper copies. Please send records to Eve C. Gartner at [egartner@earthjustice.org](mailto:egartner@earthjustice.org), or mail them to:

Eve C. Gartner, Esq.  
Earthjustice  
156 William St., Suite 800  
New York, NY 10038-5326

As FOIA requires, we expect your response within twenty working days of your receipt of this request. In the event that you have any questions concerning the type of materials we are interested in receiving, please contact me by email or by telephone at 212-791-1881 ext. 8222.

Thank you for your assistance in this matter.

Sincerely,



Eve C. Gartner

RECEIVED  
SEP 12 2012



new FOIA request  
Eve C. Gartner to: FOIA HQ

09/12/2012 10:07 AM

Dear Sir or Madam –

Attached please find a FOIA request related to the withdrawal by EPA of the CAFO Reporting Rule announced on July 20, 2012.

Many thanks for your attention to this matter.

Eve Gartner

Eve C. Gartner  
Staff Attorney  
Earthjustice  
156 William Street  
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New York, New York 10038  
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Because the earth needs a good lawyer

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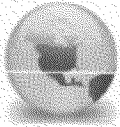
\*please consider the environment before printing



FOIA to EPA - Withdrawal of Reporting Rule-final.pdf



**APPENDIX B: NRDC/PEW FOIA Request (EPA-HQ-2013-001516)**



**FOIA Request- NRDC and Pew Charitable Trusts**  
Althouse, Claire to: FOIA HQ  
Cc: "Devine, Jon", Julie Janovsky , Nathaniel Keller

10/24/2012 06:16 PM

To Whom It May Concern:

I write on behalf of the Natural Resources Defense Council and the Pew Charitable Trusts to request disclosure of records pursuant to the Freedom of Information Act and EPA FOIA regulations. Attached, please find a copy of correspondence mailed today concerning the above-mentioned request.

Sincerely,

Claire Althouse

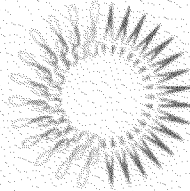
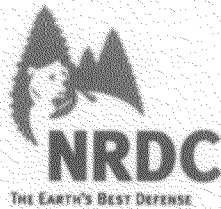
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Claire Althouse  
Policy Analyst • Water Program  
Natural Resources Defense Council  
1314 Second Street  
Santa Monica, CA 90401  
T: (310) 434-2300  
F: (310) 434-2399

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Pew-NRDC CAFO FOIA 10-24-12.pdf



THE  
**PEW**  
CHARITABLE TRUSTS

October 24, 2012

*Via Regular Mail and Electronic Mail to:*

National Freedom of Information Officer  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue, NW (2822T)  
Washington, DC 20460  
E-mail: [hq.foia@epa.gov](mailto:hq.foia@epa.gov)

**Re: Freedom of Information Act Request for Records Related to EPA's Ability to  
Protect the Public from Concentrated Animal Feeding Operations' Pollution**

To Whom It May Concern:

On behalf of the Natural Resources Defense Council ("NRDC") and the Pew Charitable Trusts, we write to request disclosure of records pursuant to the Freedom of Information Act ("FOIA"),<sup>1</sup> and the Environmental Protection Agency ("EPA") FOIA regulations.<sup>2</sup>

NRDC is comprised of more than 1.3 million members and online activists and over 350 lawyers, scientists, and advocates who are committed to protecting our natural resources for health and future generations. This includes protecting our nation's water supply from pollution caused by animal agriculture.

The Pew Charitable Trusts' Campaign to Reform Industrial Animal Agriculture is dedicated to advancing pollution control policies to mitigate waste from animal agriculture and create a new system that is less damaging to the environment, rural communities and human health.

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<sup>1</sup> 5 U.S.C. § 552.

<sup>2</sup> 40 C.F.R. 2.100 ff.

## **I. Description of Records Sought**

NRDC and the Pew Charitable Trusts ask that EPA please produce all records<sup>3</sup> in EPA's possession, custody or control relating to EPA's withdrawal of the proposed National Pollutant Discharge Elimination System ("NPDES") Concentrated Animal Feeding Operation ("CAFO") Reporting Rule ("Reporting Rule").<sup>4</sup>

These records should include, without limitation:

1. Any records pertaining to the Reporting Rule that are not contained in the public docket for that rule that were submitted to EPA by: The American Farm Bureau Federation, The National Pork Producers Council, The National Cattlemen's Beef Association, The United Egg Producers, The U.S. Poultry & Egg Association, The National Council of Farmer Cooperatives, The National Milk Producers Federation, The National Chicken Council, the National Turkey Federation, The National Corn Growers Association, or any other agricultural trade association.
2. Any records providing factual information concerning the completeness, accuracy, and public accessibility of states' CAFO information in the following areas:
  - a. The legal name of the owner of the CAFO or an authorized representative, their mailing address, email address, and primary telephone number,
  - b. The legal name and address of the CAFO owner/operator, if the name and address of an authorized representative is provided above,
  - c. The location of the CAFO's production area, identified by latitude and longitude and street address,
  - d. If the owner or operator has NPDES permit coverage, the date of issuance of coverage under the NPDES permit, and the permit number,
  - e. For the previous 12-month period, identification of each animal type confined either in open confinement including partially covered area, or housed totally under roof at the CAFO for 45 days or more, and the maximum number of each animal type confined at the CAFO for 45 days or more,
  - f. Where the owner or operator land applies manure, litter, and process wastewater, the total number of acres under the control of the owner or operator available for land application,
  - g. If the CAFO is a contract operation, the name and address of the integrator,

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<sup>3</sup> The term "records" is used herein to mean anything denoted by the use of that word or its singular form in the text of FOIA. In particular, the term includes, but is not limited to, all writings (handwritten, typed, electronic, or otherwise produced, reproduced, or stored) including, but not limited to, correspondence, minutes of meetings, memoranda, notes, e-mails, notices, facsimiles, charts, tables, presentations, orders and filings.

<sup>4</sup> National Pollutant Discharge Elimination System (NPDES) Concentrated Animal Feeding Operation (CAFO) Reporting Rule, 76 Fed. Reg. 65,431 (Oct. 21, 2011) (Docket No. EPA-HQ-OW-2011-0188) [hereinafter *CAFO Reporting Rule*].

- h. Type and capacity of manure storage used at the CAFO,
  - i. Quantity of manure, process wastewater, and litter generated annually by the CAFO,
  - j. If the CAFO land-applies, whether it implements a nutrient management plan for land application,
  - k. If the CAFO land-applies, whether it employs nutrient management practices and keeps records on site consistent with 40 CFR 122.23(e),
  - l. If the CAFO does not land apply, alternative uses of manure, litter and/or wastewater, and
  - m. Whether the CAFO transfers manure off site, and if so, the quantity transferred to recipient(s) of transferred manure.
3. Any records that provide any of items 2.a-m, above, for any CAFO in the U.S.

## II. Request for Fee Waiver

NRDC and the Pew Charitable Trusts request that EPA waive the fee that it would otherwise charge for search and production of the records described above. FOIA dictates that requested records be furnished without any charge or at a reduced charge if A) "disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operation or activities of the government," and B) "is not primarily in the commercial interest of the requester."<sup>5</sup> The requested disclosure would meet both of these requirements. In addition, NRDC qualifies as a "representative of the news media" entitled to a reduction of fees under FOIA.<sup>6</sup>

### A. Disclosure is in the Public Interest and would Contribute Significantly to Public Understanding of the Operations of the Government

FOIA dictates that a fee waiver should be granted when a disclosure is "likely to contribute significantly to public understanding of the operations or activities of the government."<sup>7</sup> The records described above shed light on a matter of considerable public interest and concern: the extent to which EPA has the capacity to effectively mitigate water pollution from CAFOs.

As EPA pointed out in the proposed Reporting Rule, "pollutants from manure, litter, and process wastewater can affect human health and the environment."<sup>8</sup> EPA noted that "despite more than 35 years of regulating CAFOS, reports of water quality impacts from large animal feeding

<sup>5</sup> 5 U.S.C. § 552(a)(4)(A)(iii); 40 CFR 2.107(l).

<sup>6</sup> 5 U.S.C. § 552(a)(4)(A)(ii)(II); 40 CFR 2.107(d).

<sup>7</sup> 5 U.S.C. § 552(a)(4)(A)(iii); 40 CFR 2.107(l).

<sup>8</sup> CAFO Reporting Rule, *supra* note 4, at 65,433.



operations persist.”<sup>9</sup> Pollutants commonly found in CAFO waste include nutrients, pathogens, heavy metals, and pharmaceuticals.<sup>10</sup> These pollutants cause toxic algal blooms, human disease, and human reproductive problems.<sup>11</sup> It is of great public concern that waste containing these pollutants is effectively managed and contamination of water resources is avoided.

The Government Accountability Office recommended in a 2008 report to Congress that EPA “should complete the Agency’s effort to develop a national inventory of permitted CAFOs” because “EPA has neither the information it needs to assess the extent to which CAFOs may be contributing to water pollution, nor the information it needs to ensure compliance with the Clean Water Act.”<sup>12</sup> EPA withdrew the Reporting Rule, which would have gathered information EPA needs to perform its duty of protecting public health and water quality. It is therefore in the public interest to determine what “operations or activities” the EPA plans to use to deal with the staggering lack of information about CAFOs and the persistent pollution affiliated with these facilities.

The tailored request in this letter seeks disclosure of important records concerning EPA’s activities that will contribute meaningfully and significantly to public understanding of CAFO pollution. Disclosure of these records will contribute “significantly” to public understanding because NRDC and the Pew Charitable Trusts will disseminate summary and analysis of any newsworthy information conveyed in the requested records.

As a not for profit organization, the Pew Charitable Trusts is well-equipped to analyze and disseminate the requested information, and may use this information to contribute to the public’s understanding of the EPA’s withdrawal of the proposed NPDES CAFO Reporting Rule. The Pew Charitable Trusts could disseminate that information in a number of ways including through the Pew Charitable Trusts’ website, <http://www.pewtrusts.org>, Pew Environment Group’s website, <http://www.pewenvironment.org>, and its publication *The Latest*, which has a circulation of nearly 120,000 people. In addition, it could distribute the information through the state and national media by way of press releases or other media for general public consumption.

NRDC publishes information in its magazine, *OnEarth*, which is distributed to over 150,000 subscribers, for sale to newsstands and bookstores, and free of charge at <http://www.nrdc.org/onearth>. NRDC also has the ability to disseminate information on CAFO pollution through its website, <http://www.nrdc.org>, which is updated daily and draws approximately 2.5 million page views and 700,000 visits per month; its *Nature’s Voice* newsletter on current environmental issues, distributed five times a year to NRDC’s

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<sup>9</sup> Id.

<sup>10</sup> Id.

<sup>11</sup> Id.

<sup>12</sup> U.S. Gov’t Accountability Office, *Concentrated Animal Feeding Operations: EPA Needs More Information and a Clearly Defined Strategy to Protect Air and Water Quality*, GAO-08-944 5 (2008), page 48.

approximately 650,000 members and online at <http://www.nrdc.org/naturesvoice/>, and other newsletters and alerts. NRDC's *Earth Action* email list has more than 165,000 subscribers who receive biweekly information on urgent environmental issues. This information is also made available through NRDC's online Action Center at <http://www.nrdc.org/legislation/legwatch.asp>. *This Green Life* is an electronic newsletter on environmentally sustainable living distributed by email to 55,000 subscribers and made available online at <http://www.nrdc.org/thisgreenlife/>. NRDC issues press releases; participates in press conferences and interviews with reporters and editorial writers; and has over twenty staff members dedicated to communications work.<sup>13</sup> Finally, NRDC employees provide Congressional testimony, appear on television, radio, and web broadcasts and at conferences; and contribute to numerous national newspapers, magazines, academic journals, other periodicals, and books.<sup>14</sup>

NRDC routinely uses FOIA to obtain information from federal agencies that NRDC legal and scientific experts analyze in order to inform the public about a variety of issues including energy policy, climate change, wildlife protection, nuclear weapons, pesticides, drinking water safety, and air quality. Some specific examples are provided below:

1. NRDC obtained through a court-enforced FOIA request records of the operations of Bush Administration's Energy Task Force, headed by Vice President Dick Cheney. It made those records available, along with analysis of selected excerpts and links to the administration's index of withheld documents, on NRDC's website at <http://www.NRDC.org/air/energy/taskforce/tfinx.asp>. NRDC's efforts helped to inform the public about an issue that, even before the records' release, had attracted considerable attention.<sup>15</sup>
2. NRDC obtained through a FOIA request a memorandum by ExxonMobil advocating the replacement of a highly respected atmospheric scientist, Dr. Robert Watson, as the head of the Intergovernmental Panel on Climate Change. NRDC used this memorandum to

<sup>13</sup> See "Communications" staff list at <http://www.nrdc.org/about/staff.asp>.

<sup>14</sup> See, e.g., Tammy Weber, *EPA Can't Regulate Livestock Farms it Can't Find*, Huffington Post, [http://www.huffingtonpost.com/2012/08/02/epa-cant-regulate-livesto\\_n\\_1732414.html](http://www.huffingtonpost.com/2012/08/02/epa-cant-regulate-livesto_n_1732414.html) (Aug. 2, 2012) (quoting NRDC Senior Attorney Jon Devine); Kristin Eberhard and Evan Gillespie, "How LADWP can do right by Angelenos," Op-Ed, L.A. Times (Sept. 11, 2012) (co-authored by NRDC Western Energy and Climate Program Legal Director Kristin Eberhard); Alice Park, "Waste Not," Time Magazine (Sept. 10, 2012) (quoting NRDC Senior Scientist Allen Hershkowitz); Steve Scher, "Food: Why Americans Waste So Much and Ways to Stop," KOUW (Seattle Public Radio), Aug. 30, 2012 (featuring NRDC Scientist Dana Gunders); "Weighing Benefits and Pitfalls of Increased Oil and Gas Production in the U.S.," PBS NewsHour, Aug. 10, 2012 (featuring NRDC Senior Attorney Kate Sinding); "Clean Air in California: What's it Going to Take?" 2012 Environmental Law Conference at Yosemite, Oct. 28, 2012 (featuring NRDC Attorney Adrian Martinez).

<sup>15</sup> See, e.g., Elizabeth Shogren, *Bush Gets One-Two Punch on Energy*, L.A. Times (Mar. 28, 2002), at A22; Bennett Roth, *Houston Energy-Drilling Firm Appears in Documents from Energy Department*, Houston Chronicle (Apr. 12, 2002).

help inform the public about what may have been behind the decision by the Bush Administration to replace Dr. Watson.<sup>16</sup>

3. NRDC incorporated information obtained through FOIA into a 2005 report, published and provided free of charge at NRDC's website,<sup>17</sup> on the impacts of military sonar and other industrial noise pollution on marine life.<sup>18</sup>

Disclosure of the requested documents is "likely to contribute significantly to public understanding" of EPA's activities concerning CAFO pollution<sup>19</sup> because NRDC intends to disseminate any newsworthy information in the released records, and its analysis of such records, to its member base and to the broader public, through one or more of the many communications channels referenced above. As NRDC's long history of incorporating information obtained through FOIA into reports, articles, and other communications illustrates, NRDC is well prepared to convey to the public any relevant information it obtains through this records request.

**B. NRDC and the Pew Charitable Trusts have no Commercial Interest that would be Furthered by the Requested Information**

Disclosure in this case would also satisfy the second prerequisite of a fee waiver request<sup>20</sup> because "Congress amended FOIA to ensure that it be 'liberally construed in favor of waivers for noncommercial requesters.'"<sup>21</sup> NRDC and the Pew Charitable Trusts are not-for-profit organizations and, as such, have no commercial interest.

NRDC's and the Pew Charitable Trusts' primary interest in obtaining the above records is to serve the public by disclosing presently non-public information about EPA's ability to protect the public from CAFO pollution. As previously discussed, CAFOs are a significant source of water pollution, and waste from CAFOs contains substances that are hazardous to humans and the environment. Because CAFOs are potentially so harmful to human health and natural places, it is in the public interest to examine how EPA plans to protect against the harmful effects of CAFO pollution.

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<sup>16</sup> See NRDC Press Release and Exxon memorandum, "Confidential Papers Show Exxon Hand in White House Move to Oust Top Scientist from International Global Warming Panel," (Apr. 3, 2002); Elizabeth Shogren, *Charges Fly Over Science Panel Pick*, L.A. Times (Apr. 4, 2002).

<sup>17</sup> See <http://www.nrdc.org/wildlife/marine/sound/contents.asp>.

<sup>18</sup> See NRDC, *Sounding the Depths II* (Nov. 2005) (update to a 1999 report). Since the report's publication, the sonar issue has continued to attract widespread public attention. See, e.g., D. Fleshler, "Navy testing could devastate whales and dolphins, groups say," Ft. Lauderdale Sun Sentinel, July 13, 2012.

<sup>19</sup> 5 U.S.C. § 552(a)(4)(A)(iii).

<sup>20</sup> 5 U.S.C. § 552(a)(4)(A)(iii); 40 CFR 2.107(l)(3).

<sup>21</sup> *Judicial Watch v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003) (internal citation omitted).

### **C. NRDC is a Media Requester**

Even if EPA denies a public interest waiver of all costs and fees, NRDC is a representative of the news media entitled to a reduction of fees under FOIA.<sup>22</sup> As described previously in this request, NRDC publishes a quarterly magazine, *OnEarth*, which has more than 150,000 subscribers and is available at newsstands and bookstores; publishes a periodic newsletter for its more than 650,000 members nationally; issues regular electronic newsletters, action alerts, public reports and analyses; and maintains a free online library of reports and analyses. These publications routinely include information about current events of interest to the readership and the public. NRDC staff members are also regular contributors to numerous periodicals, books, and the NRDC Switchboard blog, <http://www.switchboard.nrdc.org/>; television, radio, and web programs; and hearings and conferences. CAFO pollution specifically has been featured in some of NRDC's media outlets.<sup>23</sup> As previously noted, information obtained as a result of this request will, if appropriately newsworthy, be disseminated through one or more of NRDC's publications or other suitable channels.

### **III. Willingness to Pay Fees Under Protest**

Please provide the records above irrespective of the status and outcome of your evaluation of NRDC's and the Pew Charitable Trusts' fee category assertion and fee waiver request. In order to prevent delay in EPA's provision of the requested records, NRDC and the Pew Charitable Trusts state that they will, if necessary and under protest, pay fees in accordance with 40 CFR 2.107. Please consult with me, however, before undertaking any action that would cause the fee to exceed \$500. Such payment will not constitute any waiver of NRDC's and the Pew Charitable Trusts' right to seek administrative or judicial review of any denial of its fee waiver request and/or rejection of its fee category assertion.

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<sup>22</sup> 5 U.S.C. § 552(a)(4)(A)(ii); 40 CFR 2.107(d).

<sup>23</sup> See, e.g., Posting of Jon Devine to NRDC Switchboard Blog, *EPA Chickens Out by Dropping Industrial Livestock Information Collection Effort*, (July 24, 2012), [http://switchboard.nrdc.org/blogs/jdevine/epa\\_chickens\\_out\\_by\\_dropping\\_i.html](http://switchboard.nrdc.org/blogs/jdevine/epa_chickens_out_by_dropping_i.html); Dan Rosen, *Cow Woes*, *OnEarth Magazine* (Aug. 26, 2012), available at <http://www.onearth.org/article/cow-woes>.



#### IV. Conclusion

We trust that, in responding to this request, EPA will comply with all relevant deadlines and other obligations set forth in FOIA and EPA's regulations.<sup>24</sup>

To the extent that the requested records are available in a readily accessible electronic format, we would prefer to receive documents electronically, either by email or on a CD. If electronic copies are unavailable, we will accept paper copies. Please send records to Jon Devine at [jdevine@nrdc.org](mailto:jdevine@nrdc.org), or mail them to:

Jon Devine  
NRDC  
1152 15<sup>th</sup> Street NW, Suite 300  
Washington, DC 20005

Please produce records on a rolling basis; at no point should EPA's search for or deliberations concerning certain records delay the production of others that EPA has already retrieved and is obliged to produce.

In the event that EPA concludes that some of the records requested above may already be publicly available, we will be happy to discuss those conclusions in an effort to narrow the scope of this request.

Thank you for your prompt attention to this request.

Sincerely,



**Jon P. Devine, Jr.**  
Senior Attorney  
Natural Resources Defense Council  
202-289-6868  
[jdevine@nrdc.org](mailto:jdevine@nrdc.org)



**Karen Steuer**  
Director, Government Relations  
Pew Environment Group  
202-887-8818  
[ksteuer@pewtrusts.org](mailto:ksteuer@pewtrusts.org)

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<sup>24</sup> See 5 U.S.C. § 552; 40 CFR 2.100 ff.

**To:** Campbell, Ann[Campbell.Ann@epa.gov]  
**Cc:** Nguyen, Quoc[Nguyen.Quoc@epa.gov]  
**From:** Molloy, Jennifer  
**Sent:** Tue 11/7/2017 8:39:43 PM  
**Subject:** FW: Privacy Act training participants  
OW Privacy Training Nov 7 2017.pptx

I didn't send out the invite, so I can't add this to it. Ann can you do that?

Meanwhile, I will circulate this to the CAFO-related folks in the agency (OECA, Regions) who are very interested in it.

Jenny Molloy

U.S. EPA

Water Permits Division

202.564.1939

[molloy.jennifer@epa.gov](mailto:molloy.jennifer@epa.gov)

**From:** Nguyen, Quoc  
**Sent:** Tuesday, November 7, 2017 1:46 PM  
**To:** Molloy, Jennifer <[molloy.jennifer@epa.gov](mailto:molloy.jennifer@epa.gov)>; Campbell, Ann <[Campbell.Ann@epa.gov](mailto:Campbell.Ann@epa.gov)>  
**Subject:** RE: Privacy Act training participants

Thanks, Jenny.

Attach is the powerpoint presentation.

Also, here's a recording of the training.

[http://e](#) **Ex. 5 - Attorney Client; DPP**

Can you upload this information into the meeting invite?

Thank you.

Quoc

**To:** Johnston, Carey[Johnston.Carey@epa.gov]; Levine, MaryEllen[levine.maryellen@epa.gov]; Nguyen, Quoc[Nguyen.Quoc@epa.gov]; Miller, Kevin[Miller.Kevin@epa.gov]; Wallace, Jane[wallace.jane@epa.gov]; Dombrowski, John[Dombrowski.John@epa.gov]; Holic, Daniel[Holic.Daniel@epa.gov]; Clark, Jackie[Clark.Jackie@epa.gov]; Ragnauth, Elizabeth[Ragnauth.Elizabeth@epa.gov]; Greenwald, Kathryn[Greenwald.Kathryn@epa.gov]  
**Cc:** Utting, George[Utting.George@epa.gov]  
**From:** Molloy, Jennifer  
**Sent:** Tue 4/25/2017 6:05:47 PM  
**Subject:** RE: OECA Responses on Ag Related FOIAs - Discussion with OGC (Post AFBF v EPA)  
FINAL Instructions for Handling CAFO Information Related to AFBF 3-30-17.pdf

Jenny Molloy

U.S. EPA

Water Permits Division

202.564.1939

molloy.jennifer@epa.gov

-----Original Appointment-----

**From:** Johnston, Carey  
**Sent:** Monday, March 06, 2017 1:49 PM  
**To:** Johnston, Carey; Levine, MaryEllen; Nguyen, Quoc; Miller, Kevin; Wallace, Jane; Dombrowski, John; Holic, Daniel; Clark, Jackie; Ragnauth, Elizabeth; Greenwald, Kathryn  
**Cc:** Molloy, Jennifer; Utting, George  
**Subject:** OECA Responses on Ag Related FOIAs - Discussion with OGC (Post AFBF v EPA)  
**When:** Tuesday, April 25, 2017 2:00 PM-3:00 PM (UTC-05:00) Eastern Time (US & Canada).  
**Where:** DCRoomARS5149C

## Overview

The purpose of the meeting is how OECA should respond to FOIAs that relate to the Ag sector (Post AFBF v EPA).



Note to Jackie / Beth – Please forward to anyone in OWM that you think would like to participate. OWM might also get Ag-related FOIAs. Thanks.

#### Audio Conference Details

Phone

Code: Ex. 6 - Personal Privacy

**Instructions for Handling Concentrated Animal Feeding Operations Information Related to AFBF v. EPA, No. 13-1751 (D. Minn.)  
March 30, 2017**

The Agency recently settled a reverse-Freedom of Information Act (FOIA) case involving certain information related to concentrated animal feeding operations and facilities (CAFOs) for 36 states. Specifically, on March 24, 2017, the U.S. District Court in the District of Minnesota entered a Stipulation of Settlement and Dismissal (Settlement Agreement) in AFBF v. EPA, No. 13-1751 (D. Minn.). See Appendix A, Settlement Agreement.

**The Settlement Agreement requires your attention in the event future FOIA requests seek the information at issue in the settled case.**

Pursuant to the Settlement Agreement, EPA agreed to provide written instructions to Headquarters FOIA Coordinators and Regional FOIA Officers. The instructions below address how the Agency should respond to future FOIA requests for the information at issue in the settled case.

**INSTRUCTIONS**

***Information addressed by this instruction:*** The information at issue in the settled case was the set of 73 documents or spreadsheets responsive to two FOIA requests submitted by Earthjustice (EPA-HQ-2012-001337) and the Natural Resources Defense Council and the Pew Charitable Trusts (EPA-HQ-2013-001516). See Appendix B, the two FOIA requests. The Office of Water's Office of Wastewater Management collected this information about CAFOs from twenty-seven state permitting authorities, eight state websites, EPA databases, and EPA regional offices. The Office of Wastewater Management responded to the two FOIA requests (EPA-HQ-2012-001337 and EPA-HQ-2013-001516) and produced redacted information from the 73 documents or spreadsheets through FOIAonline. The following links will direct you to the Agency's final response to these two requests:

- 1) EPA-HQ-2012-001337:  
<https://foiaonline.regulations.gov/foia/action/public/view/request?objectId=090004d28000843a>
- 2) EPA-HQ-2013-001516:  
<https://foiaonline.regulations.gov/foia/action/public/view/request?objectId=090004d28001613d>

Provided below are examples of FOIA requests the Agency has received that specifically sought the 73 documents or spreadsheets at issue in the settled case.

*Language from FOIA requests seeking the 73 documents or spreadsheets:*

- "Freedom of Information Act request for information related to the withdrawal of the CAFO Reporting Rule, from Eve C. Gartner, Esq, Earthjustice, dated September 11, 2012."

- “Freedom of Information Act request for disclosure of records [related to the withdrawal of the CAFO Reporting Rule]...from Claire Althouse [or Jon Devine], Natural Resources Defense Council, dated October 24, 2012.”
- “All records responsive to FOIA requests 2012-1337 and 2013-1516.”
- “[A]ny records...to the proposed NPDES CAFO Reporting Rule (76 Fed. Reg. 65,431 (Oct. 21, 2011)).”

***Instructions for handling CAFO FOIA requests seeking the 73 documents or spreadsheets at issue in the settled case:*** If EPA receives a FOIA request seeking the 73 documents or spreadsheets or to which the 73 documents or spreadsheets, as described above (*see* “Information addressed by this instruction”), are responsive, you are to respond by referring the requester(s) to FOIAonline and referencing the response provided to EPA-HQ-2012-001337 and EPA-HQ-2013-001516. Please refer to the public URL links above.

If you have any questions, please contact Jenny Molloy, Office of Water, at 202-564-1939 or Quoc Nguyen, Office of General Counsel, at 202-564-6342.

**APPENDIX A: Settlement Agreement**

UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA  
Civil No. 13-1751 (ADM/TNL)

AMERICAN FARM BUREAU  
FEDERATION, and NATIONAL PORK  
PRODUCERS COUNCIL

Plaintiffs,

v.

U.S. ENVIRONMENTAL PROTECTION  
AGENCY, and GINA McCARTHY,<sup>1</sup>  
Administrator U.S. Environmental Protection  
Agency,

Defendants,

and

FOOD & WATER WATCH,  
ENVIRONMENTAL INTEGRITY  
PROJECT, AND IOWA CITIZENS FOR  
COMMUNITY IMPROVEMENT,

Intervenors.

**STIPULATION OF SETTLEMENT  
AND DISMISSAL**

WHEREAS, on July 5, 2013, Plaintiffs, the American Farm Bureau Federation (“AFBF”) and National Pork Producers Council (“NPPC”) (together, “Plaintiffs”), filed their Complaint for Declaratory and Injunctive Relief (“Complaint”), alleging a claim under the Administrative Procedure Act and seeking an Order enjoining the U.S.

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<sup>1</sup> Scott Pruitt is now the Administrator of EPA. Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, Mr. Pruitt should be substituted for Gina McCarthy as defendant in this suit.



Environmental Protection Agency (“EPA”) from disclosing certain information (referred to herein as the “disputed information”) in response to Freedom of Information Act (“FOIA”) requests submitted by Earthjustice (EPA-HQ-2012-001337) and the Natural Resources Defense Council and the Pew Charitable Trusts (EPA-HQ-2013-001516).

WHEREAS, the disputed information consists of a set of 73 documents (“disputed information”) that EPA collected from twenty-seven state permitting authorities, eight state websites, EPA databases, and EPA regional offices, following the Agency’s determination to compile reliable information about concentrated animal feeding operations (“CAFOs”) in the United States using existing data sources rather than promulgating a rule requiring CAFOs to submit information directly to EPA.

WHEREAS, in this lawsuit, Plaintiffs allege that portions of the disputed information are protected by Exemption 6 of the FOIA, which pertains to “[p]ersonnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” 5 U.S.C. § 552(b)(6).

WHEREAS, the disputed information consists of data pertaining to animal feeding operations, which is aggregated by state, for the following states: Alabama, Arizona, Arkansas, California, Colorado, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Louisiana, Maine, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Jersey, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Dakota, Tennessee, Texas, Utah, Washington, Wisconsin, and Wyoming.

WHEREAS, the disputed information was filed in the administrative record in this matter, at ECF. No. 69, Exhibits 16 and 32.

WHEREAS, Plaintiffs, AFBF and NPPC, and Defendants, Administrator Scott Pruitt and EPA, wish to avoid any further litigation and controversy and to settle and

compromise fully any and all claims and issues that have been raised, or could have been raised in this action, which have transpired prior to the execution of this Stipulation of Settlement and Dismissal ("Stipulation").

Now, therefore, the parties, by and through their respective counsel, hereby settle and compromise the above-captioned lawsuit. The parties stipulate that this matter is hereby settled and compromised on the following terms:

1. Defendants agree that only the columns reflecting permit status, city, county, and 5-digit zip code in the disputed information, which, as defined above, consists of 73 documents set forth at ECF No. 69, Exhibits 16 and 32, will be released in response to the FOIA requests at issue in this case, EPA-HQ-2012-001337 and EPA-HQ-2013-001516. All other columns and fields in the disputed information will be redacted pursuant to 5 U.S.C. § 552(b)(6).

2. Defendants have provided, and Plaintiffs have reviewed, the disputed information with the agreed-upon redactions, and those redactions are attached hereto as Exhibit A.

3. Defendants also agree to release the same redacted disputed information, as set forth in Exhibit A, in response to the following pending FOIA requests submitted to EPA Headquarters that seek the disputed information: (1) EPA-HQ-2013-006737; (2) EPA-HQ-2013-006604; (3) EPA-HQ-2013-004128; (4) EPA-HQ-2013-008906; (5) EPA-HQ-2013-007430; (6) EPA-HQ-2013-006913; (7) EPA-HQ-2013-004097; (8) EPA-HQ-2015-004064; (9) EPA-HQ-2015-006732; and (10) EPA-HQ-2016-008563. Defendants further agree to post the redacted disputed information, responsive to the

FOIA requests identified in Paragraphs 1 and 3, to FOIAonline ([www.FOIAonline.regulations.gov](http://www.FOIAonline.regulations.gov)), consistent with 5 U.S.C. § 552(a)(2)(D).

4. Within 7 calendar days of the execution of this Stipulation, Defendants will provide the redacted disputed information, set forth at Exhibit A, in response to the FOIA requests identified in Paragraphs 1 and 3 above.

5. Within 7 calendar days of the execution of this Stipulation, Defendants will request in writing that the FOIA requesters in EPA-HQ-2012-001337 and EPA-HQ-2013-001516 return to EPA or destroy all copies of any previous responses to those FOIA requests and cease any further or ongoing dissemination of the same.

6. This Stipulation does not bind Defendants with respect to its response to any FOIA request other than the FOIA requests identified in Paragraphs 1 and 3 of this Stipulation. Within 7 calendar days of execution of this Stipulation, Defendants agree to provide written instruction to EPA's Regional and Headquarters FOIA coordinators that if they receive a FOIA request seeking the disputed information, as defined above, they are to respond by referring the requester(s) to FOIAonline and referencing the response provided to EPA-HQ-2012-001337 and EPA-HQ-2013-001516. This instruction will also be included in the training described below in paragraph 7.

7. Defendants agree to conduct training for managers in EPA's Office of Water and Regional and Headquarters FOIA coordinators regarding the Agency's obligations under the FOIA and the Privacy Act. Among other things, the training will focus on Exemption 6 of the FOIA, the Privacy Act, and other relevant privacy issues. The training will be conducted in the 2017 calendar year.

8. Plaintiffs agree to dismiss this lawsuit with prejudice. Such dismissal shall be effected via the stipulation of voluntary dismissal with prejudice per Fed. R. Civ. P. 41(a)(1)(A)(ii) that is attached hereto as Exhibit B. The parties shall file with the Court such stipulation of dismissal within ten business days of execution of this Stipulation.

9. This Stipulation constitutes the full and complete satisfaction of any and all claims on behalf of Plaintiffs arising from (a) the allegations set forth in the complaint filed in this lawsuit and (b) any litigation or administrative proceeding that Plaintiffs have brought, could bring, or could have brought against Defendants regarding the specific FOIA requests identified in Paragraphs 1 and 3 of this Stipulation, including all claims for attorneys' fees and costs. Any and all remaining claims and issues in this litigation are released and waived by all parties.

10. This Stipulation does not constitute an admission of liability or fault on the part of Defendants, the EPA, or its agents, servants, or employees, and this Stipulation shall not be construed as an admission of liability or fault. This Stipulation is entered into by both parties for the sole purpose of compromising disputed claims and avoiding the expenses and risks of further litigation. This Stipulation will not be used in any manner to establish liability for fees, amounts, or hourly rates, in any other case or proceeding.

11. This Stipulation is binding upon and inures to the benefit of the parties hereto and their respective successors and assigns.

12. Each party will bear its own attorney's fees and costs.

13. The undersigned attorneys are authorized to enter into this Stipulation of Settlement on behalf of their respective clients.

14. This Stipulation may be executed in counterparts as if executed by both parties on the same document.

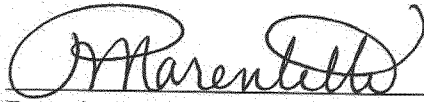
[Signatures next page]



U.S. ENVIRONMENTAL PROTECTION AGENCY &  
E. SCOTT PRUITT, ADMINISTRATOR

GREGORY G. BROOKER  
Acting United States Attorney  
District of Minnesota

BY:



DATE: March 23, 2017

Pamela A. Marentette  
Assistant United States Attorney

AMERICAN FARM BUREAU FEDERATION

BY:

Ellen Steen,  
General Counsel & Secretary

DATE: \_\_\_\_\_

NATIONAL PORK PRODUCERS COUNCIL

BY:

Michael Formica,  
Assistant Vice President & Counsel, Domestic Policy

DATE: \_\_\_\_\_



**EARTHJUSTICE**

ALASKA CALIFORNIA FLORIDA MID-PACIFIC NORTHEAST NORTHERN ROCKIES  
NORTHWEST ROCKY MOUNTAIN WASHINGTON, DC INTERNATIONAL

**RECEIVED**  
SEP 12 2012

September 11, 2012

By Email: [hq.foia@epa.gov](mailto:hq.foia@epa.gov)

National Freedom of Information Officer  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue, NW (2822T)  
Washington, DC 20460  
(202) 566-1667 FAX (202) 566-2147  
E-mail: [hq.foia@epa.gov](mailto:hq.foia@epa.gov)

Re: Freedom of Information Request for information related to the withdrawal of the  
CAFO Reporting Rule

Dear Freedom of Information Officer:

Earthjustice submits this request for records in accordance with the provisions of the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. In accordance with FOIA, please provide us with the following records relating to the rule proposed by the Environmental Protection Agency ("EPA") on October 21, 2011, under section 308 of the Clean Water Act, to collect information about concentrated animal feeding operations (CAFOs) (the "CAFO Reporting Rule"), and the withdrawal of the CAFO Reporting Rule announced by EPA on July 20, 2012:

1. All records, including all communications, shared or otherwise maintained between EPA and any other governmental agency (including, but not limited to, the United States Department of Agriculture and/or the United States Geological Survey) relating to the CAFO Reporting Rule and/or the 2012 withdrawal of the CAFO Reporting Rule ;
2. All records reflecting any communication, written or verbal, between the EPA and any private party, corporation or non-profit organization (including, but not limited to, the National Pork Producers Council, the American Farm Bureau Federation, the National Chicken Council, the U.S. Poultry & Egg Association, and the National Milk Producer's Federation) relating to the CAFO Reporting Rule and/or the 2012 withdrawal of the CAFO Reporting Rule;
3. All records created or updated since November 28, 2008, relating to EPA's evaluation of information publicly available about CAFOs in the United States.
4. All records, including, but not limited to, all communications and records identifying, discussing, mentioning, describing, reporting or analyzing, the July 2012 memorandum of understanding (MOU) entitled "Collaborative Efforts to Collect and

156 WILLIAM STREET SUITE 800 NEW YORK, NY 10038  
T: 212.791.1881 F: 212.918.1556 E: [neoffice@earthjustice.org](mailto:neoffice@earthjustice.org) W: [www.earthjustice.org](http://www.earthjustice.org)

Exchange Information about Concentrated Animal Feeding Operations" entered into between EPA and the Association of Clean Water Administrators;

5. All records relating to how EPA will obtain information about CAFOs in states for which current site-specific information about CAFOs is not available on the internet, including, at a minimum, CAFOs in Maine, Massachusetts, New Hampshire, Rhode Island, Vermont, Puerto Rico, U.S. Virgin Islands, West Virginia, Georgia, Illinois, Minnesota, Kansas, Nevada, Alaska, Idaho, and Washington;
6. All records relating to and/or identifying existing sources of information about CAFOs, including the AFOs themselves, and EPA's proposed and intended data collection process for gathering that information.

The use of the word "record" above includes, but is not limited to, documents in all forms (including electronic), information, emails, faxes, letters, comments, reports, summaries of telephone conversations, handwritten notes, meeting minutes, or any other materials. **EPA need not produce documents that are part of the docket for the CAFO Reporting Rule (Docket EPA-HQ-QW-2011-0188) as posted on Regulations.gov.**

The use of the word "unredacted" above means that we are seeking full disclosure of all information in the requested record. In the event that you determine that you can disclose only some of the information contained in a record that falls within the scope of this request, please provide us with a copy of the record with only the information that you have determined to be properly treated as confidential redacted.

If any information requested herein was, but is no longer, in EPA's possession or subject to its control, state whether it is (a) missing or lost, (b) has been destroyed, (c) has been transferred voluntarily or involuntarily to others, or (d) otherwise disposed of, and in each instance, explain the circumstances surrounding and authorization for such disposition of it and state the date or approximate date of it.

If you claim that any of the foregoing information is exempt from mandatory disclosure, we respectfully request that you:

- (1) Provide an index of all documents containing the requested information, reflecting the date, author, addressee, number of pages, and subject matter of such documents;
- (2) State the exemption you deem to be applicable to each information request;
- (3) State with particularity the reason why such exemption is applicable to each information request;
- (4) Examine each information request to determine if reasonably segregable non-exempt information exists which may be released after redacting information deemed to be exempt; and
- (5) Exercise your discretion to release such records notwithstanding the availability of a basis for withholding.

#### **FEE WAIVER REQUEST**

Pursuant to 5 U.S.C. § 552(a)(4)(A)(iii), we request a fee waiver because "disclosure of the requested information is in the public interest because it is likely to contribute significantly to

public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” *Id.* As demonstrated below, each of the four factors related to the first fee waiver requirement, as specified in EPA’s FOIA regulations at 40 C.F.R. § 2.107(l)(2)(i)-(iv), weigh in favor of granting our fee waiver request.

***Factor 1: The Requested Records Concern the Operations or Activities of the Federal Government.***

The subject matter of the requested records concerns “identifiable operations or activities of the Federal government,” 40 C.F.R. § 2.107(l)(2)(i), insofar as the requests relate to EPA’s proposal to promulgate the CAFO Reporting Rule and its subsequent decision to withdraw is proposal to promulgate such a rule.

***Factor 2: Disclosure of the Requested Records is Likely to Contribute to Public Understanding of Government Operations or Activities.***

Disclosure of the requested records is “likely to contribute” to an “increased public understanding,” 40 C.F.R. § 2.107(l)(2)(ii), of government operations or activities because such disclosure will enable the requester to understand why EPA decided to withdraw the CAFO Reporting Rule, and how EPA expects to be able to develop facility-specific information about all the CAFOs in the United States, including facility location and basic operational characteristics that relate to how and why a facility may discharge, without requiring CAFOs to report this information to EPA. This information is not already accessible through EPA’s website. *See* Factor 4, below.

***Factor 3: Disclosure of the Requested Records Will Contribute to the Understanding of a Broad Audience of Persons Interested in How the Government Decided Not to Require CAFOs to Report and in How the Government Will Identify CAFOs that Are Discharging, But Are Not in the NPDES Program***

Disclosure will “contribute to the understanding of a reasonably broad audience of persons interested in” learning about the Government’s efforts to regulate CAFOs under the Clean Water Act, and how EPA can comply with its mandates under the Clean Water Act without gathering the information it would have received under the CAFO Reporting Rule. This is because Earthjustice, the requesting organization, is a national nonprofit environmental law firm which has made safeguarding the environment, including especially the nation’s waters, one of its top priorities and has developed expertise in this area. In order to further its work to protect the nation’s waters, Earthjustice has brought numerous lawsuits seeking to enforce the Clean Water Act, and filed several Clean Water Act petitions with EPA. *See, e.g., Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*, 557 U.S. 261 (2009) (counsel of record for respondents Southeast Alaska Conservation Council, et al. in case involving the discharge of wastewater into Lower Slate Lake); *Friends of Everglades v. South Florida Water Management Dist.*, 570 F.3d 1210 (11th Cir. 2009) (representing plaintiffs in case involving pumping of polluted water into Lake Okeechobee); *Petition under the Clean Water Act to Establish Toxicity Criteria and Require Toxicity Testing and Public Disclosure of Ingredients for Products on the National Contingency Plan Product Schedule* (Oct. 13, 2010),

[http://earthjustice.org/sites/default/files/files/dispersant\\_petition\\_0.pdf](http://earthjustice.org/sites/default/files/files/dispersant_petition_0.pdf). In addition, Earthjustice has filed or intervened in several lawsuits involving pollution emanating from CAFOs. *See, e.g., Waterkeeper Alliance v. EPA*, No. 09-1017 (D.C. Cir. Jan. 15, 2009) (representing petitioners in challenge to regulations exempting from reporting air releases of hazardous substances from animal waste at farms); *Rose Acre Farms, Inc. v. NC Department of Environment and Natural Resources*, No. 12-CVS-10 (Super. Ct. Hyde Cty March 2, 2012) (representing intervenors on side of State agency defending decision to require egg CAFO to operate under NPDES permit). Because of our expertise in this area, Earthjustice is well-prepared to analyze and evaluate the records we receive pursuant to this request and assess them in the context of the statutory mandates of the Clean Water Act and the information already available to EPA about CAFOs, and determine whether EPA's can fulfill its Clean Water Act obligations with respect to CAFOs in light of the decision to withdraw the CAFO Reporting Rule.

In addition to being able to analyze the information provided to determine whether EPA's actions can be reconciled with its obligations under the Clean Water Act, Earthjustice has the "ability and intention to convey this information to the public." 40 C.F.R. § 2.107(l)(2)(iii). Earthjustice can publicize information received from this request – and its analysis of whether the withdrawal of the CAFO Reporting Rule is consistent with the EPA's Clean Water Act's mandates -- in its monthly electronic newsletter, which serves approximately 223,000 subscribers. Earthjustice also can utilize its online action alert system to urge members of the public to contact policymakers and ask them to take action based on information received from this request; typically, 15,000 to 20,000 individuals respond to such alerts. Finally, Earthjustice's full-time health campaigner can disseminate newsworthy information obtained from this request to the media, and Earthjustice's full-time health lobbyist can provide relevant information obtained from this request to elected officials in Washington..

***Factor 4: The Contribution to Public Understanding of Government Operations or Activities Will Be Significant.***

The public's understanding of government operations or activities related to EPA's knowledge of pollution caused by CAFOs and whether EPA has an adequate plan for determining which CAFOs are discharging pollutants into waters of the United States, "as compared to the level of public understanding existing prior to disclosure, [will] be enhanced by the disclosure to a significant extent." 40 C.F.R. § 2.107(l)(2)(iv). Because so little is publicly known or understood about EPA's plan for learning about, and addressing, discharges from CAFOs in the absence of the CAFO Reporting Rule, public understanding of these efforts will undoubtedly be enhanced to a significant extent by disclosures in response to this request.

In addition, the second fee waiver requirement – that the request "is not primarily in the commercial interest of the requester," 40 C.F.R. § 2.107(l)(1) – is also met here. The requester, Earthjustice, is a 501(c)(3) nonprofit organization and does not have any "commercial interest that would be furthered by the requested disclosure" of information.<sup>1</sup> 40 C.F.R. § 2.107(l)(3)(i).

<sup>1</sup> Indeed, the legislative history of the fee waiver provision reveals that it was added to FOIA "in an attempt to prevent government agencies from using high fees to discourage certain types of requesters, and requests," in particular those from journalists, scholars and nonprofit public interest groups. *See Ettlinger v. FBI*, 596 F. Supp. 867, 872 (D. Mass. 1984).



Indeed, Requester's sole interest in obtaining the requested information is to broaden public understanding of why EPA withdrew the CAFO Reporting Rule, and whether EPA has a reasonable plan in place to learn about which CAFOs are likely discharging, and to undertake advocacy efforts related to improving EPA's regulation of CAFOs under the Clean Water Act, if appropriate.

In sum, this request meets the requirements for a fee waiver. In the event that fees are not waived, please notify and inform us of the basis for your decision.

#### INSTRUCTIONS FOR RECORD DELIVERY

To the extent that the requested records are available in a readily accessible electronic format, we would prefer to receive the documents electronically, either by email or on a CD. If electronic copies are unavailable, we will accept paper copies. Please send records to Eve C. Gartner at [egartner@earthjustice.org](mailto:egartner@earthjustice.org), or mail them to:

Eve C. Gartner, Esq.  
Earthjustice  
156 William St., Suite 800  
New York, NY 10038-5326

As FOIA requires, we expect your response within twenty working days of your receipt of this request. In the event that you have any questions concerning the type of materials we are interested in receiving, please contact me by email or by telephone at 212-791-1881 ext. 8222.

Thank you for your assistance in this matter.

Sincerely,



Eve C. Gartner

RECEIVED  
SEP 12 2012



new FOIA request  
Eve C. Gartner to: FOIA HQ

09/12/2012 10:07 AM

Dear Sir or Madam –

Attached please find a FOIA request related to the withdrawal by EPA of the CAFO Reporting Rule announced on July 20, 2012.

Many thanks for your attention to this matter.

Eve Gartner

Eve C. Gartner  
Staff Attorney  
Earthjustice  
156 William Street  
Suite 800  
New York, New York 10038  
T: 212-791-1881 ext. 8222  
F: 212-918-1556  
[www.earthjustice.org](http://www.earthjustice.org)

Because the earth needs a good lawyer

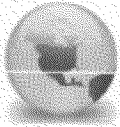
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FOIA to EPA - Withdrawal of Reporting Rule-final.pdf

**APPENDIX B: NRDC/PEW FOIA Request (EPA-HQ-2013-001516)**



**FOIA Request- NRDC and Pew Charitable Trusts**

Althouse, Claire to: FOIA HQ

Cc: "Devine, Jon", Julie Janovsky

, Nathaniel Keller

10/24/2012 06:16 PM

To Whom It May Concern:

I write on behalf of the Natural Resources Defense Council and the Pew Charitable Trusts to request disclosure of records pursuant to the Freedom of Information Act and EPA FOIA regulations. Attached, please find a copy of correspondence mailed today concerning the above-mentioned request.

Sincerely,

Claire Althouse

--

Claire Althouse

Policy Analyst • Water Program

Natural Resources Defense Council

1314 Second Street

Santa Monica, CA 90401

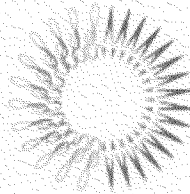
T: (310) 434-2300

F: (310) 434-2399

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Pew-NRDC CAFO FOIA 10-24-12.pdf



THE  
**PEW**  
CHARITABLE TRUSTS

October 24, 2012

*Via Regular Mail and Electronic Mail to:*

National Freedom of Information Officer  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue, NW (2822T)  
Washington, DC 20460  
E-mail: [hq.foia@epa.gov](mailto:hq.foia@epa.gov)

**Re: Freedom of Information Act Request for Records Related to EPA's Ability to  
Protect the Public from Concentrated Animal Feeding Operations' Pollution**

To Whom It May Concern:

On behalf of the Natural Resources Defense Council ("NRDC") and the Pew Charitable Trusts, we write to request disclosure of records pursuant to the Freedom of Information Act ("FOIA"),<sup>1</sup> and the Environmental Protection Agency ("EPA") FOIA regulations.<sup>2</sup>

NRDC is comprised of more than 1.3 million members and online activists and over 350 lawyers, scientists, and advocates who are committed to protecting our natural resources for health and future generations. This includes protecting our nation's water supply from pollution caused by animal agriculture.

The Pew Charitable Trusts' Campaign to Reform Industrial Animal Agriculture is dedicated to advancing pollution control policies to mitigate waste from animal agriculture and create a new system that is less damaging to the environment, rural communities and human health.

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<sup>1</sup> 5 U.S.C. § 552.

<sup>2</sup> 40 C.F.R. 2.100 ff.

## **I. Description of Records Sought**

NRDC and the Pew Charitable Trusts ask that EPA please produce all records<sup>3</sup> in EPA's possession, custody or control relating to EPA's withdrawal of the proposed National Pollutant Discharge Elimination System ("NPDES") Concentrated Animal Feeding Operation ("CAFO") Reporting Rule ("Reporting Rule").<sup>4</sup>

These records should include, without limitation:

1. Any records pertaining to the Reporting Rule that are not contained in the public docket for that rule that were submitted to EPA by: The American Farm Bureau Federation, The National Pork Producers Council, The National Cattlemen's Beef Association, The United Egg Producers, The U.S. Poultry & Egg Association, The National Council of Farmer Cooperatives, The National Milk Producers Federation, The National Chicken Council, the National Turkey Federation, The National Corn Growers Association, or any other agricultural trade association.
2. Any records providing factual information concerning the completeness, accuracy, and public accessibility of states' CAFO information in the following areas:
  - a. The legal name of the owner of the CAFO or an authorized representative, their mailing address, email address, and primary telephone number,
  - b. The legal name and address of the CAFO owner/operator, if the name and address of an authorized representative is provided above,
  - c. The location of the CAFO's production area, identified by latitude and longitude and street address,
  - d. If the owner or operator has NPDES permit coverage, the date of issuance of coverage under the NPDES permit, and the permit number,
  - e. For the previous 12-month period, identification of each animal type confined either in open confinement including partially covered area, or housed totally under roof at the CAFO for 45 days or more, and the maximum number of each animal type confined at the CAFO for 45 days or more,
  - f. Where the owner or operator land applies manure, litter, and process wastewater, the total number of acres under the control of the owner or operator available for land application,
  - g. If the CAFO is a contract operation, the name and address of the integrator,

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<sup>3</sup> The term "records" is used herein to mean anything denoted by the use of that word or its singular form in the text of FOIA. In particular, the term includes, but is not limited to, all writings (handwritten, typed, electronic, or otherwise produced, reproduced, or stored) including, but not limited to, correspondence, minutes of meetings, memoranda, notes, e-mails, notices, facsimiles, charts, tables, presentations, orders and filings.

<sup>4</sup> National Pollutant Discharge Elimination System (NPDES) Concentrated Animal Feeding Operation (CAFO) Reporting Rule, 76 Fed. Reg. 65,431 (Oct. 21, 2011) (Docket No. EPA-HQ-OW-2011-0188) [hereinafter *CAFO Reporting Rule*].



- h. Type and capacity of manure storage used at the CAFO,
  - i. Quantity of manure, process wastewater, and litter generated annually by the CAFO,
  - j. If the CAFO land-applies, whether it implements a nutrient management plan for land application,
  - k. If the CAFO land-applies, whether it employs nutrient management practices and keeps records on site consistent with 40 CFR 122.23(e),
  - l. If the CAFO does not land apply, alternative uses of manure, litter and/or wastewater, and
  - m. Whether the CAFO transfers manure off site, and if so, the quantity transferred to recipient(s) of transferred manure.
3. Any records that provide any of items 2.a-m, above, for any CAFO in the U.S.

## **II. Request for Fee Waiver**

NRDC and the Pew Charitable Trusts request that EPA waive the fee that it would otherwise charge for search and production of the records described above. FOIA dictates that requested records be furnished without any charge or at a reduced charge if A) "disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operation or activities of the government," and B) "is not primarily in the commercial interest of the requester."<sup>5</sup> The requested disclosure would meet both of these requirements. In addition, NRDC qualifies as a "representative of the news media" entitled to a reduction of fees under FOIA.<sup>6</sup>

### **A. Disclosure is in the Public Interest and would Contribute Significantly to Public Understanding of the Operations of the Government**

FOIA dictates that a fee waiver should be granted when a disclosure is "likely to contribute significantly to public understanding of the operations or activities of the government."<sup>7</sup> The records described above shed light on a matter of considerable public interest and concern: the extent to which EPA has the capacity to effectively mitigate water pollution from CAFOs.

As EPA pointed out in the proposed Reporting Rule, "pollutants from manure, litter, and process wastewater can affect human health and the environment."<sup>8</sup> EPA noted that "despite more than 35 years of regulating CAFOS, reports of water quality impacts from large animal feeding

<sup>5</sup> 5 U.S.C. § 552(a)(4)(A)(iii); 40 CFR 2.107(l).

<sup>6</sup> 5 U.S.C. § 552(a)(4)(A)(ii)(II); 40 CFR 2.107(d).

<sup>7</sup> 5 U.S.C. § 552(a)(4)(A)(iii); 40 CFR 2.107(l).

<sup>8</sup> CAFO Reporting Rule, *supra* note 4, at 65,433.

operations persist.”<sup>9</sup> Pollutants commonly found in CAFO waste include nutrients, pathogens, heavy metals, and pharmaceuticals.<sup>10</sup> These pollutants cause toxic algal blooms, human disease, and human reproductive problems.<sup>11</sup> It is of great public concern that waste containing these pollutants is effectively managed and contamination of water resources is avoided.

The Government Accountability Office recommended in a 2008 report to Congress that EPA “should complete the Agency’s effort to develop a national inventory of permitted CAFOs” because “EPA has neither the information it needs to assess the extent to which CAFOs may be contributing to water pollution, nor the information it needs to ensure compliance with the Clean Water Act.”<sup>12</sup> EPA withdrew the Reporting Rule, which would have gathered information EPA needs to perform its duty of protecting public health and water quality. It is therefore in the public interest to determine what “operations or activities” the EPA plans to use to deal with the staggering lack of information about CAFOs and the persistent pollution affiliated with these facilities.

The tailored request in this letter seeks disclosure of important records concerning EPA’s activities that will contribute meaningfully and significantly to public understanding of CAFO pollution. Disclosure of these records will contribute “significantly” to public understanding because NRDC and the Pew Charitable Trusts will disseminate summary and analysis of any newsworthy information conveyed in the requested records.

As a not for profit organization, the Pew Charitable Trusts is well-equipped to analyze and disseminate the requested information, and may use this information to contribute to the public’s understanding of the EPA’s withdrawal of the proposed NPDES CAFO Reporting Rule. The Pew Charitable Trusts could disseminate that information in a number of ways including through the Pew Charitable Trusts’ website, <http://www.pewtrusts.org>, Pew Environment Group’s website, <http://www.pewenvironment.org>, and its publication *The Latest*, which has a circulation of nearly 120,000 people. In addition, it could distribute the information through the state and national media by way of press releases or other media for general public consumption.

NRDC publishes information in its magazine, *OnEarth*, which is distributed to over 150,000 subscribers, for sale to newsstands and bookstores, and free of charge at <http://www.nrdc.org/onearth>. NRDC also has the ability to disseminate information on CAFO pollution through its website, <http://www.nrdc.org>, which is updated daily and draws approximately 2.5 million page views and 700,000 visits per month; its *Nature’s Voice* newsletter on current environmental issues, distributed five times a year to NRDC’s

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<sup>9</sup> Id.

<sup>10</sup> Id.

<sup>11</sup> Id.

<sup>12</sup> U.S. Gov’t Accountability Office, *Concentrated Animal Feeding Operations: EPA Needs More Information and a Clearly Defined Strategy to Protect Air and Water Quality*, GAO-08-944 5 (2008), page 48.

approximately 650,000 members and online at <http://www.nrdc.org/naturesvoice/>, and other newsletters and alerts. NRDC's *Earth Action* email list has more than 165,000 subscribers who receive biweekly information on urgent environmental issues. This information is also made available through NRDC's online Action Center at <http://www.nrdc.org/legislation/legwatch.asp>. *This Green Life* is an electronic newsletter on environmentally sustainable living distributed by email to 55,000 subscribers and made available online at <http://www.nrdc.org/thisgreenlife/>. NRDC issues press releases; participates in press conferences and interviews with reporters and editorial writers; and has over twenty staff members dedicated to communications work.<sup>13</sup> Finally, NRDC employees provide Congressional testimony, appear on television, radio, and web broadcasts and at conferences; and contribute to numerous national newspapers, magazines, academic journals, other periodicals, and books.<sup>14</sup>

NRDC routinely uses FOIA to obtain information from federal agencies that NRDC legal and scientific experts analyze in order to inform the public about a variety of issues including energy policy, climate change, wildlife protection, nuclear weapons, pesticides, drinking water safety, and air quality. Some specific examples are provided below:

1. NRDC obtained through a court-enforced FOIA request records of the operations of Bush Administration's Energy Task Force, headed by Vice President Dick Cheney. It made those records available, along with analysis of selected excerpts and links to the administration's index of withheld documents, on NRDC's website at <http://www.NRDC.org/air/energy/taskforce/tfinx.asp>. NRDC's efforts helped to inform the public about an issue that, even before the records' release, had attracted considerable attention.<sup>15</sup>
2. NRDC obtained through a FOIA request a memorandum by ExxonMobil advocating the replacement of a highly respected atmospheric scientist, Dr. Robert Watson, as the head of the Intergovernmental Panel on Climate Change. NRDC used this memorandum to

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<sup>13</sup> See "Communications" staff list at <http://www.nrdc.org/about/staff.asp>.

<sup>14</sup> See, e.g., Tammy Weber, *EPA Can't Regulate Livestock Farms it Can't Find*, Huffington Post, [http://www.huffingtonpost.com/2012/08/02/epa-cant-regulate-livesto\\_n\\_1732414.html](http://www.huffingtonpost.com/2012/08/02/epa-cant-regulate-livesto_n_1732414.html) (Aug. 2, 2012) (quoting NRDC Senior Attorney Jon Devine); Kristin Eberhard and Evan Gillespie, "How LADWP can do right by Angelenos," Op-Ed, L.A. Times (Sept. 11, 2012) (co-authored by NRDC Western Energy and Climate Program Legal Director Kristin Eberhard); Alice Park, "Waste Not," Time Magazine (Sept. 10, 2012) (quoting NRDC Senior Scientist Allen Hershkowitz); Steve Scher, "Food: Why Americans Waste So Much and Ways to Stop," KOUW (Seattle Public Radio), Aug. 30, 2012 (featuring NRDC Scientist Dana Gunders); "Weighing Benefits and Pitfalls of Increased Oil and Gas Production in the U.S.," PBS NewsHour, Aug. 10, 2012 (featuring NRDC Senior Attorney Kate Sinding); "Clean Air in California: What's it Going to Take?" 2012 Environmental Law Conference at Yosemite, Oct. 28, 2012 (featuring NRDC Attorney Adrian Martinez).

<sup>15</sup> See, e.g., Elizabeth Shogren, *Bush Gets One-Two Punch on Energy*, L.A. Times (Mar. 28, 2002), at A22; Bennett Roth, *Houston Energy-Drilling Firm Appears in Documents from Energy Department*, Houston Chronicle (Apr. 12, 2002).

help inform the public about what may have been behind the decision by the Bush Administration to replace Dr. Watson.<sup>16</sup>

3. NRDC incorporated information obtained through FOIA into a 2005 report, published and provided free of charge at NRDC's website,<sup>17</sup> on the impacts of military sonar and other industrial noise pollution on marine life.<sup>18</sup>

Disclosure of the requested documents is "likely to contribute significantly to public understanding" of EPA's activities concerning CAFO pollution<sup>19</sup> because NRDC intends to disseminate any newsworthy information in the released records, and its analysis of such records, to its member base and to the broader public, through one or more of the many communications channels referenced above. As NRDC's long history of incorporating information obtained through FOIA into reports, articles, and other communications illustrates, NRDC is well prepared to convey to the public any relevant information it obtains through this records request.

**B. NRDC and the Pew Charitable Trusts have no Commercial Interest that would be Furthered by the Requested Information**

Disclosure in this case would also satisfy the second prerequisite of a fee waiver request<sup>20</sup> because "Congress amended FOIA to ensure that it be 'liberally construed in favor of waivers for noncommercial requesters.'"<sup>21</sup> NRDC and the Pew Charitable Trusts are not-for-profit organizations and, as such, have no commercial interest.

NRDC's and the Pew Charitable Trusts' primary interest in obtaining the above records is to serve the public by disclosing presently non-public information about EPA's ability to protect the public from CAFO pollution. As previously discussed, CAFOs are a significant source of water pollution, and waste from CAFOs contains substances that are hazardous to humans and the environment. Because CAFOs are potentially so harmful to human health and natural places, it is in the public interest to examine how EPA plans to protect against the harmful effects of CAFO pollution.

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<sup>16</sup> See NRDC Press Release and Exxon memorandum, "Confidential Papers Show Exxon Hand in White House Move to Oust Top Scientist from International Global Warming Panel," (Apr. 3, 2002); Elizabeth Shogren, *Charges Fly Over Science Panel Pick*, L.A. Times (Apr. 4, 2002).

<sup>17</sup> See <http://www.nrdc.org/wildlife/marine/sound/contents.asp>.

<sup>18</sup> See NRDC, *Sounding the Depths II* (Nov. 2005) (update to a 1999 report). Since the report's publication, the sonar issue has continued to attract widespread public attention. See, e.g., D. Fleshler, "Navy testing could devastate whales and dolphins, groups say," Ft. Lauderdale Sun Sentinel, July 13, 2012.

<sup>19</sup> 5 U.S.C. § 552(a)(4)(A)(iii).

<sup>20</sup> 5 U.S.C. § 552(a)(4)(A)(iii); 40 CFR 2.107(l)(3).

<sup>21</sup> *Judicial Watch v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003) (internal citation omitted).



### **C. NRDC is a Media Requester**

Even if EPA denies a public interest waiver of all costs and fees, NRDC is a representative of the news media entitled to a reduction of fees under FOIA.<sup>22</sup> As described previously in this request, NRDC publishes a quarterly magazine, *OnEarth*, which has more than 150,000 subscribers and is available at newsstands and bookstores; publishes a periodic newsletter for its more than 650,000 members nationally; issues regular electronic newsletters, action alerts, public reports and analyses; and maintains a free online library of reports and analyses. These publications routinely include information about current events of interest to the readership and the public. NRDC staff members are also regular contributors to numerous periodicals, books, and the NRDC Switchboard blog, <http://www.switchboard.nrdc.org/>; television, radio, and web programs; and hearings and conferences. CAFO pollution specifically has been featured in some of NRDC's media outlets.<sup>23</sup> As previously noted, information obtained as a result of this request will, if appropriately newsworthy, be disseminated through one or more of NRDC's publications or other suitable channels.

### **III. Willingness to Pay Fees Under Protest**

Please provide the records above irrespective of the status and outcome of your evaluation of NRDC's and the Pew Charitable Trusts' fee category assertion and fee waiver request. In order to prevent delay in EPA's provision of the requested records, NRDC and the Pew Charitable Trusts state that they will, if necessary and under protest, pay fees in accordance with 40 CFR 2.107. Please consult with me, however, before undertaking any action that would cause the fee to exceed \$500. Such payment will not constitute any waiver of NRDC's and the Pew Charitable Trusts' right to seek administrative or judicial review of any denial of its fee waiver request and/or rejection of its fee category assertion.

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<sup>22</sup> 5 U.S.C. § 552(a)(4)(A)(ii); 40 CFR 2.107(d).

<sup>23</sup> See, e.g., Posting of Jon Devine to NRDC Switchboard Blog, *EPA Chickens Out by Dropping Industrial Livestock Information Collection Effort*, (July 24, 2012), [http://switchboard.nrdc.org/blogs/jdevine/epa\\_chickens\\_out\\_by\\_dropping\\_i.html](http://switchboard.nrdc.org/blogs/jdevine/epa_chickens_out_by_dropping_i.html); Dan Rosen, *Cow Woes*, *OnEarth Magazine* (Aug. 26, 2012), available at <http://www.onearth.org/article/cow-woes>.



#### IV. Conclusion

We trust that, in responding to this request, EPA will comply with all relevant deadlines and other obligations set forth in FOIA and EPA's regulations.<sup>24</sup>

To the extent that the requested records are available in a readily accessible electronic format, we would prefer to receive documents electronically, either by email or on a CD. If electronic copies are unavailable, we will accept paper copies. Please send records to Jon Devine at [jdevine@nrdc.org](mailto:jdevine@nrdc.org), or mail them to:

Jon Devine  
NRDC  
1152 15<sup>th</sup> Street NW, Suite 300  
Washington, DC 20005

Please produce records on a rolling basis; at no point should EPA's search for or deliberations concerning certain records delay the production of others that EPA has already retrieved and is obliged to produce.

In the event that EPA concludes that some of the records requested above may already be publicly available, we will be happy to discuss those conclusions in an effort to narrow the scope of this request.

Thank you for your prompt attention to this request.

Sincerely,



**Jon P. Devine, Jr.**  
Senior Attorney  
Natural Resources Defense Council  
202-289-6868  
[jdevine@nrdc.org](mailto:jdevine@nrdc.org)



**Karen Steuer**  
Director, Government Relations  
Pew Environment Group  
202-887-8818  
[ksteuer@pewtrusts.org](mailto:ksteuer@pewtrusts.org)

---

<sup>24</sup> See 5 U.S.C. § 552; 40 CFR 2.100 ff.

**To:** Forster, Rosa[Forster.Rosa@epa.gov]; Thompson, Patricia[thompson.patricia@epa.gov]  
**Cc:** Dombrowski, John[Dombrowski.John@epa.gov]; Wallace, Jane[wallace.jane@epa.gov];  
Hufford, Steve[Hufford.Steve@epa.gov]; Holic, Daniel[Holic.Daniel@epa.gov]; Hobus,  
Cindy[hobus.cindy@epa.gov]; Swift, Jason[Swift.Jason@epa.gov]; Torreano,  
Michelle[Torreano.Michelle@epa.gov]; Mundell, Michael[Mundell.Michael@epa.gov]; Keith,  
Elinor[Keith.Elinor@epa.gov]; Barrette, Michael[Barrette.Michael@epa.gov]; Kane,  
Rebecca[Kane.Rebecca@epa.gov]; Tuxbury, Courtney[Tuxbury.Courtney@epa.gov]; Kadish,  
Rochele[Kadish.Rochele@epa.gov]; Mirza, Sabah[Mirza.Sabah@epa.gov]; Lescure,  
Nasrin[Lescure.Nasrin@epa.gov]; Yourish, Jesse[yourish.jesse@epa.gov]  
**From:** Johnston, Carey  
**Sent:** Tue 4/25/2017 8:36:49 PM  
**Subject:** handout for the Wednesday eRule bi-weekly with David (April 26th, 11am)  
[eRule Bi-Weekly Update \(26 April 2017\).docx](#)  
[FINAL Instructions for Handing CAFO Information Related to AFBF 3-30-17.pdf](#)

Hello Rosa –

Please use these handouts for David's 11am eRule meeting tomorrow. Thanks!

Carey A. Johnston, P.E.

U.S. EPA, Office of Compliance

ph: 202-566-1014

[johnston.carey@epa.gov](mailto:johnston.carey@epa.gov)

**To:** Torreano, Michelle[Torreano.Michelle@epa.gov]; Frazer, Brian[Frazer.Brian@epa.gov]; Lescure, Nasrin[Lescure.Nasrin@epa.gov]; French, Eric[French.Eric@epa.gov]; Voisin, Edward[Voisin.Edward@epa.gov]; Ragnauth, Elizabeth[Ragnauth.Elizabeth@epa.gov]; Rubin, Steven[Rubin.Steven@epa.gov]; Carioti, Joe[Carioti.Joe@epa.gov]; Kane, Rebecca[Kane.Rebecca@epa.gov]; Kadish, Rochele[Kadish.Rochele@epa.gov]; Dombrowski, John[Dombrowski.John@epa.gov]; Krausz, Brian[Krausz.Brian@epa.gov]; Swift, Jason[Swift.Jason@epa.gov]; Greenwald, Kathryn[Greenwald.Kathryn@epa.gov]; Inman, Donna[Inman.Donna@epa.gov]; Hufford, Steve[Hufford.Steve@epa.gov]; Mundell, Michael[Mundell.Michael@epa.gov]; Hoyt, Sarita[Hoyt.Sarita@epa.gov]; Hobus, Cindy[hobus.cindy@epa.gov]  
**Cc:** Barrette, Michael[Barrette.Michael@epa.gov]; Wallace, Jane[wallace.jane@epa.gov]; Pruzinsky, Amanda[Pruzinsky.Amanda@epa.gov]; Mirza, Sabah[Mirza.Sabah@epa.gov]  
**From:** Johnston, Carey  
**Sent:** Mon 4/24/2017 7:32:37 PM  
**Subject:** comments requested: draft meeting handout for eRule bi-weekly (26 April 2017) [eRule Bi-Weekly Update \(26 April 2017\).docx](#)



Hello All -

Please let me know if you have any edits to the meeting agenda or the attached handout. Thank you.

Sincerely,

Carey A. Johnston, P.E.  
U.S. EPA, Office of Compliance  
ph: 202-566-1014  
johnston.carey@epa.gov

-----Original Appointment-----

**From:** Hindin, David

**Sent:** Tuesday, September 27, 2016 6:41 PM

**To:** Hindin, David; Ager, Sara; Johnston, Carey; Bius, Catherine; Clark, Jackie; Torreano, Michelle; Frazer, Brian; Lescure, Nasrin; French, Eric; Voisin, Edward; Ragnauth, Elizabeth; Rubin, Steven; Carioti, Joe; Kane, Rebecca; Kadish, Rochele; Dombrowski, John; Krausz, Brian; Swift, Jason; Keith, Elinor; Greenwald, Kathryn; Inman, Donna; Hufford, Steve; Mundell, Michael; Hoyt, Sarita; Hobus, Cindy

**Cc:** Barrette, Michael; Wallace, Jane; Pruzinsky, Amanda; Mirza, Sabah

**Subject:** Bi-Weekly Update: NPDES E-Rule Implementation - Call In Number  
Conf. Code Ex. 6 - Personal Privacy Ex. 6 - Personal Privacy

**When:** Wednesday, April 26, 2017 11:00 AM-12:00 PM (UTC-05:00) Eastern Time (US & Canada).

**Where:** OECA-OC-IO-5142

**From:** Dombrowski, John  
**Location:** DCRoomARS5149C  
**Importance:** Normal  
**Subject:** Accepted: OECA Responses on Ag Related FOIAs - Discussion with OGC (Post AFBF v EPA)  
**Start Date/Time:** Tue 4/25/2017 6:00:00 PM  
**End Date/Time:** Tue 4/25/2017 7:00:00 PM

**To:** Johnston, Carey[Johnston.Carey@epa.gov]  
**From:** Nguyen, Quoc  
**Sent:** Tue 3/28/2017 1:09:17 PM  
**Subject:** RE: OECA Responses on Ag Related FOIAs - Discussion with OGC (Post AFBF v EPA)

Thank you!

**From:** Johnston, Carey  
**Sent:** Tuesday, March 28, 2017 9:04 AM  
**To:** Nguyen, Quoc <Nguyen.Quoc@epa.gov>  
**Subject:** RE: OECA Responses on Ag Related FOIAs - Discussion with OGC (Post AFBF v EPA)

Done.

Carey A. Johnston, P.E.

U.S. EPA, Office of Compliance

ph: 202-566-1014

[johnston.carey@epa.gov](mailto:johnston.carey@epa.gov)

**From:** Nguyen, Quoc  
**Sent:** Tuesday, March 28, 2017 8:45 AM  
**To:** Johnston, Carey <[Johnston.Carey@epa.gov](mailto:Johnston.Carey@epa.gov)>; Levine, MaryEllen <[levine.maryellen@epa.gov](mailto:levine.maryellen@epa.gov)>; Miller, Kevin <[Miller.Kevin@epa.gov](mailto:Miller.Kevin@epa.gov)>; Wallace, Jane <[wallace.jane@epa.gov](mailto:wallace.jane@epa.gov)>; Dombrowski, John <[Dombrowski.John@epa.gov](mailto:Dombrowski.John@epa.gov)>; Holic, Daniel <[Holic.Daniel@epa.gov](mailto:Holic.Daniel@epa.gov)>; Clark, Jackie <[Clark.Jackie@epa.gov](mailto:Clark.Jackie@epa.gov)>; Ragnauth, Elizabeth <[Ragnauth.Elizabeth@epa.gov](mailto:Ragnauth.Elizabeth@epa.gov)>  
**Cc:** Molloy, Jennifer <[molloy.jennifer@epa.gov](mailto:molloy.jennifer@epa.gov)>; Utting, George <[Utting.George@epa.gov](mailto:Utting.George@epa.gov)>  
**Subject:** RE: OECA Responses on Ag Related FOIAs - Discussion with OGC (Post AFBF v EPA)

Hi Carey,



We are still finalizing our instructions to FOIA coordinators and officers for the Friday deadline. In addition our letter to the two FOIA requests need to go out Friday. For these reasons, could you push this meeting for next week? I would like to have concrete deliverables completed prior to this meeting.

Thanks,

Quoc

Quoc P. Nguyen

Office of General Counsel

U.S. Environmental Protection Agency

1200 Pennsylvania Avenue, NW

Washington, DC 20460

202-564-6343

PRIVILEGED COMMUNICATION for internal deliberation only; may contain deliberative, attorney-client, attorney work product, or otherwise privileged material; do not distribute outside EPA or DOJ.

-----Original Appointment-----

**From:** Johnston, Carey  
**Sent:** Monday, March 06, 2017 1:45 PM  
**To:** Johnston, Carey; Levine, MaryEllen; Nguyen, Quoc; Miller, Kevin; Wallace, Jane; Dombrowski, John; Holic, Daniel; Clark, Jackie; Ragnauth, Elizabeth  
**Cc:** Molloy, Jennifer; Utting, George  
**Subject:** OECA Responses on Ag Related FOIAs - Discussion with OGC (Post AFBF v EPA)  
**When:** Wednesday, March 29, 2017 2:00 PM-3:00 PM (UTC-05:00) Eastern Time (US & Canada).  
**Where:** DCRoomARS5149C

## Overview

The purpose of the meeting is how OECA should respond to FOIAs that relate to the Ag sector (Post AFBF v EPA).

Note to Jackie / Beth – Please forward to anyone in OWM that you think would like to participate. OWM might also get Ag-related FOIAs. Thanks.

### Audio Conference Details

**Phone**  
**Code:** Ex. 6 - Personal Privacy

**To:** Holic, Daniel[Holic.Daniel@epa.gov]  
**Cc:** Johnston, Carey[Johnston.Carey@epa.gov]  
**From:** Kupchan, Simma  
**Sent:** Tue 5/23/2017 9:24:44 PM  
**Subject:** RE: FOIA Response

I set it up, but could not find any time next week when everyone was free, so I didn't make it till June 6. If that's a problem, feel free to propose a time for next week, if you can find one!

Thanks,

Simma Kupchan

Water Law Office

US EPA Office of General Counsel

William Jefferson Clinton Building North Room 7426Q

(p) 202-564-3105

**From:** Holic, Daniel  
**Sent:** Tuesday, May 23, 2017 2:06 PM  
**To:** Kupchan, Simma <Kupchan.Simma@epa.gov>  
**Cc:** Johnston, Carey <Johnston.Carey@epa.gov>  
**Subject:** FW: FOIA Response

Simma,

I believe we will need a face-to-face meeting to discuss this. If you are able to set this up for next week, please invite the following from our end:

Holic, Daniel [Holic.Daniel@epa.gov](mailto:Holic.Daniel@epa.gov); Blodgett, James <[Blodgett.James@epa.gov](mailto:Blodgett.James@epa.gov)>; Johnson, James A. <[Johnson.Jamesa@epa.gov](mailto:Johnson.Jamesa@epa.gov)>; Dombrowski, John <[Dombrowski.John@epa.gov](mailto:Dombrowski.John@epa.gov)>;

Johnston, Carey <[Johnston.Carey@epa.gov](mailto:Johnston.Carey@epa.gov)>

Thank you,

Dan

Associate Chief, Data Systems & Information Management Branch

OECA/OC/Enforcement Targeting & Data Division

202-564-7117

**From:** Johnston, Carey

**Sent:** Tuesday, May 23, 2017 1:49 PM

**To:** Kupchan, Simma <[Kupchan.Simma@epa.gov](mailto:Kupchan.Simma@epa.gov)>; Holic, Daniel <[Holic.Daniel@epa.gov](mailto:Holic.Daniel@epa.gov)>

**Cc:** Nguyen, Quoc <[Nguyen.Quoc@epa.gov](mailto:Nguyen.Quoc@epa.gov)>; Blodgett, James <[Blodgett.James@epa.gov](mailto:Blodgett.James@epa.gov)>;

Johnson, James A. <[Johnson.Jamesa@epa.gov](mailto:Johnson.Jamesa@epa.gov)>; Kane, Rebecca <[Kane.Rebecca@epa.gov](mailto:Kane.Rebecca@epa.gov)>;

Dombrowski, John <[Dombrowski.John@epa.gov](mailto:Dombrowski.John@epa.gov)>; Hufford, Steve <[Hufford.Steve@epa.gov](mailto:Hufford.Steve@epa.gov)>;

Wallace, Jane <[wallace.jane@epa.gov](mailto:wallace.jane@epa.gov)>; Levine, MaryEllen <[levine.maryellen@epa.gov](mailto:levine.maryellen@epa.gov)>

**Subject:** RE: FOIA Response

Hello Simma/Quoc –

**Ex. 5 - Deliberative Process; ACC**

**Ex. 5 - Deliberative Process; ACC**

Thanks.

Carey A. Johnston, P.E.

U.S. EPA, Office of Compliance

ph: 202-566-1014

[johnston.carey@epa.gov](mailto:johnston.carey@epa.gov)

**From:** Kupchan, Simma

**Sent:** Tuesday, May 23, 2017 12:04 PM

**To:** Holic, Daniel <[Holic.Daniel@epa.gov](mailto:Holic.Daniel@epa.gov)>

**Cc:** Nguyen, Quoc <[Nguyen.Quoc@epa.gov](mailto:Nguyen.Quoc@epa.gov)>; Blodgett, James <[Blodgett.James@epa.gov](mailto:Blodgett.James@epa.gov)>; Johnson, James A. <[Johnson.Jamesa@epa.gov](mailto:Johnson.Jamesa@epa.gov)>; Johnston, Carey <[Johnston.Carey@epa.gov](mailto:Johnston.Carey@epa.gov)>; Kane, Rebecca <[Kane.Rebecca@epa.gov](mailto:Kane.Rebecca@epa.gov)>; Dombrowski, John <[Dombrowski.John@epa.gov](mailto:Dombrowski.John@epa.gov)>; Hufford, Steve <[Hufford.Steve@epa.gov](mailto:Hufford.Steve@epa.gov)>; Wallace, Jane <[wallace.jane@epa.gov](mailto:wallace.jane@epa.gov)>; Levine, MaryEllen <[levine.maryellen@epa.gov](mailto:levine.maryellen@epa.gov)>

**Subject:** RE: FOIA Response

Hi Daniel,

Apologies for the delayed response.

Ex. 5 - Deliberative Process; ACC

## Ex. 5 - Deliberative Process; ACC

Below I have pasted a summary of the Exemption 6 process from the brief we filed in the CAFO FOIA litigation. I am also attaching the brief, which has a much more extensive discussion of Ex. 6 as well. Quoc, feel free to forward any other guidance you may have.

As I mentioned on the phone, we'd be happy to discuss this in person next week if helpful.

Thanks,



Simma

Exemption 6 pertains to “personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.”

5 U.S.C. § 552(b)(6); *Chrysler Corp.*, 441 U.S. at 294. “[U]nder Exemption 6, the presumption in favor of disclosure is as strong as can be found anywhere in the Act.” *Id.*

at 1227 (quoting *Nat’l Ass’n of Home Builders v. Norton*, 309 F.3d 26, 32 (D.C. Cir.

2002)).

An Exemption 6 analysis consists of two steps: **first, determine whether the information at issue is contained in personnel, medical, or “similar” files, and, if so,**

**determine whether disclosure “would constitute a clearly unwarranted invasion of**

**personal privacy” by balancing the privacy interest against the public interest in**

**disclosure of the requested information.** See *Multi Ag Media LLC v. USDA*, 515 F.3d

1224, 1228 (D.C. Cir. 2008). Exemption 6 protects only “substantial, as opposed to *de minimis*,” privacy

interests. *Multi Ag Media*, 515 F.3d at 1229. **A public interest in disclosure exists where**

**release of the requested information will “shed light on an agency’s**

**performance of its**

**statutory duties.”** *Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489

U.S. 749, 773 (1989). Public oversight of government operations is the essence of public

interest under the FOIA. See *Jurewicz v. U.S. Dep’t of Agric.*, 741 F.3d 1326, 1333-34

(D.C. Cir. 2014).

Simma Kupchan

Water Law Office

US EPA Office of General Counsel

William Jefferson Clinton Building North Room 7426Q

(p) 202-564-3105

**From:** Holic, Daniel

**Sent:** Tuesday, May 16, 2017 4:19 PM

**To:** Kupchan, Simma <[Kupchan.Simma@epa.gov](mailto:Kupchan.Simma@epa.gov)>

**Cc:** Nguyen, Quoc <[Nguyen.Quoc@epa.gov](mailto:Nguyen.Quoc@epa.gov)>; Blodgett, James <[Blodgett.James@epa.gov](mailto:Blodgett.James@epa.gov)>; Johnson, James A. <[Johnson.Jamesa@epa.gov](mailto:Johnson.Jamesa@epa.gov)>; Johnston, Carey <[Johnston.Carey@epa.gov](mailto:Johnston.Carey@epa.gov)>; Kane, Rebecca <[Kane.Rebecca@epa.gov](mailto:Kane.Rebecca@epa.gov)>; Dombrowski, John <[Dombrowski.John@epa.gov](mailto:Dombrowski.John@epa.gov)>; Hufford, Steve <[Hufford.Steve@epa.gov](mailto:Hufford.Steve@epa.gov)>; Wallace, Jane <[wallace.jane@epa.gov](mailto:wallace.jane@epa.gov)>; Levine, MaryEllen <[levine.maryellen@epa.gov](mailto:levine.maryellen@epa.gov)>

**Subject:** FOIA Response

Simma,

**Ex. 5 - Deliberative Process; ACC**

I have included a couple of questions in red. Please let me know if you have any comments or questions.

**DRAFT OECA FOIA RESPONSE**

1.

**Ex. 5 - Deliberative Process; ACC**

**Ex. 5 - Deliberative Process; ACC**

**Ex. 5 - Deliberative Process; ACC**

**Ex. 5 - Deliberative Process; ACC**

**Ex. 5 - Deliberative Process; ACC**

**Ex. 5 - Attorney Client; DPP**

## **Ex. 5 - Deliberative Process; ACC**

## **Ex. 5 - Deliberative Process; ACC**

- o [SAK] Same answer as above.

## **Ex. 5 - Deliberative Process; ACC**

Thank you,

Dan

Associate Chief, Data Systems & Information Management Branch

OECA/OC/Enforcement Targeting & Data Division

202-564-7117

**To:** Yourish, Jesse[yourish.jesse@epa.gov]  
**From:** Johnston, Carey  
**Sent:** Tue 4/25/2017 8:33:22 PM  
**Subject:** FW: OECA Responses on Ag Related FOIAs - Discussion with OGC (Post AFBF v EPA)  
FINAL Instructions for Handling CAFO Information Related to AFBF 3-30-17.pdf

FYI

Carey A. Johnston, P.E.

U.S. EPA, Office of Compliance

ph: 202-566-1014

johnston.carey@epa.gov

**From:** Molloy, Jennifer  
**Sent:** Tuesday, April 25, 2017 2:06 PM  
**To:** Johnston, Carey <Johnston.Carey@epa.gov>; Levine, MaryEllen <levine.maryellen@epa.gov>; Nguyen, Quoc <Nguyen.Quoc@epa.gov>; Miller, Kevin <Miller.Kevin@epa.gov>; Wallace, Jane <wallace.jane@epa.gov>; Dombrowski, John <Dombrowski.John@epa.gov>; Holic, Daniel <Holic.Daniel@epa.gov>; Clark, Jackie <Clark.Jackie@epa.gov>; Ragnauth, Elizabeth <Ragnauth.Elizabeth@epa.gov>; Greenwald, Kathryn <Greenwald.Kathryn@epa.gov>  
**Cc:** Utting, George <Utting.George@epa.gov>  
**Subject:** RE: OECA Responses on Ag Related FOIAs - Discussion with OGC (Post AFBF v EPA)

Jenny Molloy

U.S. EPA

Water Permits Division

202.564.1939



[molloy.jennifer@epa.gov](mailto:molloy.jennifer@epa.gov)

-----Original Appointment-----

**From:** Johnston, Carey

**Sent:** Monday, March 06, 2017 1:49 PM

**To:** Johnston, Carey; Levine, MaryEllen; Nguyen, Quoc; Miller, Kevin; Wallace, Jane; Dombrowski, John; Holic, Daniel; Clark, Jackie; Ragnauth, Elizabeth; Greenwald, Kathryn

**Cc:** Molloy, Jennifer; Utting, George

**Subject:** OECA Responses on Ag Related FOIAs - Discussion with OGC (Post AFBF v EPA)

**When:** Tuesday, April 25, 2017 2:00 PM-3:00 PM (UTC-05:00) Eastern Time (US & Canada).

**Where:** DCRoomARS5149C

## Overview

The purpose of the meeting is how OECA should respond to FOIAs that relate to the Ag sector (Post AFBF v EPA).

Note to Jackie / Beth – Please forward to anyone in OWM that you think would like to participate. OWM might also get Ag-related FOIAs. Thanks.

## Audio Conference Details

Phone

Code: Ex. 6 - Personal Privacy